

**AMERICAN YEARBOOK OF INTERNATIONAL  
LAW**

Vol.1, n.1, 2022

ISSN: 2732-9925

Article 3

---

***Qui tacet consentire videtur si loqui debuisset ac potuisset v. quo tacet neque negat neque utique fatetur* (he who remains silent is considered to consent, if he must and can speak v. he who remains silent neither rejects nor accepts-affirms)**

Dimitris I. Liakopoulos

[DOI:10.5281/zenodo.10577062](https://doi.org/10.5281/zenodo.10577062)

Follow this and additional works at:

<https://ayil.rf.gd/index.php/home>

---

**Recommended Citation**

Liakopoulos, D. (2022). *Qui tacet consentire videtur si loqui debuisset ac potuisset v. quo tacet neque negat neque utique fatetur* (he who remains silent is considered to consent, if he must and can speak v. he who remains silent neither rejects nor accepts-affirms). *American Yearbook of International Law*, vol. 1, n. 1, 110-296, Article 3

Available at:

<https://ayil.rf.gd/index.php/home/issue/current>

This article is brought to you for free and open access by CEIJ. It has been accepted for inclusion in American Yearbook of International Law. For more information, please contact: [AYIL@usa.com](mailto:AYIL@usa.com)

***QUI TACET CONSENTIRE VIDETUR SI LOQUI DEBUISSET AC POTUISSET V. QUO TACET NEQUE NEGAT NEQUE UTIQUE FATETUR (HE WHO REMAINS SILENT IS CONSIDERED TO CONSENT, IF HE MUST AND CAN SPEAK V. HE WHO REMAINS SILENT NEITHER REJECTS NOR ACCEPTS-AFFIRMS)***

[DOI:10.5281/zenodo.10577062](https://doi.org/10.5281/zenodo.10577062)

prof. jr. Dimitris I. Liakopoulos<sup>1</sup>

**Abstract:** The present work aims to analyze silence/acquiescence as a legal fact that constitutes a passive conduct and produces legal effects. The paper is divided into three parts. The first analyzes silence as a legal act in international law, translates the phenomenon of acquiescence and elaborates the relative doctrine and jurisprudence as well as the limits that this term presents. We continue with the acquisitive prescription and the silence in the formation of the treaties. It compares acquiescence in dispute resolution as well as the establishment of jurisdiction of international courts and tribunals. The waiver applies to the area of international responsibility of a State and the decision-making mechanisms

---

<sup>1</sup>Professor of International law, European Union law, International and European Criminal and Procedural Law in various Universities in US and Europe. Attorney at Law (of counsel). Director of the CEIJ, New York. The present work is updated until September 2022.

within the opting-out procedure. Silence as a legal fact in *stricto sensu* integrates a qualified conduct to which the production of legal effects compose an institution of international law. The production of their legal effects contemplate the existence of an involuntary silence such as l'estoppel by silence and the extinguishing prescription. The jurisprudence from the ICJ and from arbitral awards is extensive and helps to better know and understand the institution of acquiescence and the importance that the silence of States has in contemporary international law.

**Keywords:** ICJ, public international law, silence, acquiescence, estoppel, extinguishing prescription, acquisitive prescription, general principles of law, opting out, international treaties.

### **Introduction**

The terrorist attack on the Twin Towers in 2001, the events that followed in different regions of our planet, reaching our days for Turkey's intervention in Northern Syria as well as the war in Ukraine forces us to think about the role of silence that seems to the analysis that follows is a kind of elegant death that is presented in international chess and in the development of international law (Sur, 2013) with many aspects of analysis and questions.

The interpretation of the silence presupposes a thorough study of the facts and the legal arguments presented, since in our view there is a fundamental difference between what we as observers think and believe that a State is thinking in the face of an international crisis and what it is actually thinking, feels or has as a belief, as well as what position it will hold at international levels. Silence can take various forms, such as inaction towards a situation, omissions, lack of answers, as well as statements of a purely political nature that do not have any legal status and essentially confirm a silence of acceptance or not of a situation.

We can say that silence:

“(...) is a legal principle which guarantees any individual the right to refuse to answer questions from law enforcement officers or court officials. Its is a legal right recognized explicitly or by convention, in many of the world’s legal systems (...) by “silence” we mean a lack of a publicly discernible response either to conduct reflective of a legal position or to the explicit communication of a legal position (...) to help sort the legally relevant wheat from the juridically superfluous chaff, in this part we first briefly describe some underlying principles and a related modality (...) silence might operate in general in relation to two of the main sources of international law: treaties and custom (...)” (Lewis, Modirzadeh, Blum, 2019).

Silence in our day shows that public international law has become weak. Many crises, many ongoing wars, new outbreaks, problems in the international relations of various States, controversies of all kinds (legal, political (Wright, 1924;

Harrison, 2018)<sup>2</sup>, legal and not (Fenwick, 1924)<sup>3</sup>) allow us to speak of a general weakness where many States with their attitude of not speaking, of not publicly expressing their beliefs on certain situations put the international community in a certain weakness. A phenomenon that is oriented towards an occurrence through the international practice of law where from one point of view the codification continues at all levels and on the other hand we notice a weakness in the dogmatic of the sources and in concrete references, values and shared principles (Pellet, 2018). Activities continue on various international forums towards both complex and technical codification. And on the other hand, the dialogue of international jurisdictions where the States participate, which often practice silence on certain difficult situations despite the fact that they aim at the elaboration of many conventional projects as useful tools and as the final goal for resolving disputes.

The technical language used at the disposal of the *super partes* courts, as well as their continuous dialogue and the use of jurisprudence from court to court according to the cases to

---

2“(…) until the law has become more completely developed, we may expect states to reserve the right to refuse submission of claims which they feel are economically, politically or morally justifies but not yet recognized by international law. That, as I understand it, is the meaning of the reservation, usually found in arbitration treaties, of vital interest and national honor (…).”

3“(…) the two terms, legal and justiciable, are, however, technically distinct, the former referring more properly to the nature or character of the question, while the latter refers to the extrinsic fact that in consequence of such nature the question is suitable for arbitration or judicial settlement (…).”

decide, put the judges to a fragmented reasoning that highlights not the state protection but the individual one, the person as a protagonist on the world scene and at the same time peoples consecrated by continuous violence and violations of human rights. Is this the new international law? Perhaps yes, but we are convinced that international law is also a positive, evolving, operated, open law aimed at a citable law, documented through draft articles that allow each international commission, judge, arbitrator a certain binding effect where they make evident that silence is not a negative thing, but a positive one where time often makes it the protagonist and a harbinger of the evolution of public international law. What role does silence and acquiescence in any form play in international law?

#### **Part A: Silence and its legal value in international law**

For many years silence in public international law has been characterized and examined as a legal vacuum, as a lacuna in the law that seeks to regulate what should exist but is not there. Gaps are an often unresolved phenomenon in international jurisprudence and it is also a recurring problem in legal theory that in reality is not often addressed.

According to our opinion, silence refers to a passive conduct adopted by a legal entity in certain and particular circumstances which produces a rule of the legal system and determines certain

legal effects. Silence according to Austin is a juridical fact that has both illocutionary force and perlocutionary effects (Austin, 1976). Silence is not articulated in an oral or written act (locutionary) and is capable of conveying a message (illocutionary) to produce prelocutionary effects. Consent can be expressed (*qui tacet neque negat, neque utique fatetur*) (Antunes, 2006; Kopela, 2010; Starski, 2016; Schweiger, 2018; Lewis, Modirzadeh, Blum, 2019)<sup>4</sup>.

Silence is the objective element of a habit that is formed, i.e. the habit of States to abstain from a conduct that can create an obligation not to do so. In the case of International Court of Justice (ICJ): North Sea Continental Shelf, in relation to the principle of equidistance in the delimitation of the continental shelf the ICJ affirms that:

“(...) habituality in the adoption of any conduct does not demonstrate, in itself, the existence of a custom (...)” (Dekker, Werner, 2014; Oude Elferink, 2014; Kolb, 2014; Kaczorowska-Ireland, 2015; Buga, 2018; Liakopoulos, 2020c)<sup>5</sup>.

In Nuclear Weapons Opinion case the ICJ affirms that:

“(...) the absence of precedents on the use of an atomic weapon did not reflect the conviction of the international community that the latter should be considered absolutely forbidden. Moreover, it would be at least naive to think that none of the States in possession of this type of weapon has ever launched a nuclear attack because they are convinced that such a weapon should not be used for any reason (...) more probable that no State has ever launched a nuclear attack simply for fear of being, in turn, hit by the attacked State or by one of its allies (...) it would not have pronounced itself on the so-called

---

<sup>4</sup>According to Starski: “(...) silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force (...)”.

<sup>5</sup>ICJ, North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3.

“deterrent policy”, limiting itself to noting that “(...) it is a fact that a number of States adhered to that practice (...) and continue to adhere to it (...)” (Gardam, 2001; Zyberi, 2007; Cançado Trindade, 2020)<sup>6</sup>.

In *North Sea Continental Shelf*<sup>7</sup>, the negative practice of the States has presented itself as a widespread and repeated conduct over time but at the same time inadequate for reconstructing the existence of an *opinio juris* on the prohibition of the use of nuclear weapons (Hernandez, 2014, Liakopoulos, 2020c)<sup>8</sup>.

Silence on the one hand is a conduct put in place by one or more States which represents the objective element of a custom and on the other hand it can manifest the *opinio juris*, i.e. the need or desirability that such conduct is or becomes binding (Sereni, 1964; Danilenko, 1988; Oraison, 2000)<sup>9</sup>. This binding nature is not confused with the expression of *opinio juris* (Danilenko, 1988). When a State abstains from adopting a conduct it is because it believes that it is in conformity with the principles of international law. The distinction between silence and negative practice and the manifestation of *opinio juris* must not be lost

---

6ICJ, Legality of the threat or use of nuclear weapons, advisory opinion of 8 July 1996, ICJ Reports 1996, p. 239, par. 23.

7“(...) [A]cting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature (...)”, par. 76.

8ICJ, Legality of the threat or use of nuclear weapons, advisory opinion 1996-I, in ICJ Reports of 8 July 1996, par. 67.

9With the words of judge Mahmoud Hmoud: “(...) [w]hile it is recognized that inaction may be considered a negative action, there is a distinction between inaction as a conduct, which belongs to the objective element (practice) and inaction as representative of acquiescence, thus falling under the second, subjective element (opinion juris) (...)”, cited in M. Wood, Third Report on identification of customary international law (UN Doc. A/CN.4/682), 2015 (Third Report), par. 20 ss. p. 10, note 42.

given the risk of mistaking a passive conduct for the silent *opinio juris* of a State (Mendelson, 1988)<sup>10</sup>.

The absence of protest before state action is a common reaction and tends to be interpreted as a tacit acknowledgment of the legitimacy and desirability of the conduct (Macgibbon, 1957; Danilenko, 1988; Stern, 2001; Marie, 2018)<sup>11</sup>. The frequent protests show that the conduct of a State can be considered legitimate and offers itself as an evaluable tool capable of accepting those who enjoy a rule within the international order (Fitzmaurice, 1953)<sup>12</sup>. Silence as a reaction to the action of a State puts the absence of protest in the stage of acquiescence and reflects the subjective element of a new habit. But not every silence is capable of leading to acquiescence by contributing to the formation of a habit (Macgibbon, 1957; Marie, 2018)<sup>13</sup>. Silence is “qualified”, given that it is assessable and maintained by the State in specific circumstances

---

<sup>10</sup>“(…) of course, in such a case it might be relatively easy to infer the existence of the subjective element from the practice, it one so desire (…)”.

<sup>11</sup>According to Danilenko: “(…) the basic principle (…) is that absence of protest, on the part of States directly or indirectly affected by practice, creates an obligation for the (…) non protesting States to observe customary law constituted by such practice (…)”.

<sup>12</sup>According to Fitzmaurice: “(…) [w]hen a general rule of customary law is built up by the common practice of States, (…) it is probably true to say that consent is latent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law”.

<sup>13</sup>According to Macgibbon: “(…) [a]acquiescence is of special relevance to situations involving the application of rules of which the content or authority is open to doubt either because the rules are controversial or because they are still in process of development (…)”.

(Macgibbon, 1957; Bos, 1982)<sup>14</sup>. Silence must produce acquisitive prescription as an institution that helps in the formation of customary law and does not follow the prescription mechanism (Lauterpacht, 1950)<sup>15</sup>. In both cases of creation of the process a rule and a right involves the repeated conduct over time where the silence of one or more states sanctions the affirmation of the rule or of that right (Fitzmaurice, 1953; Macgibbon, 1957)<sup>16</sup>.

Silence expresses acquiescence and affects one's habit formation when the concept of *opinio juris* is implicit as a manifestation of one's consent and where a State will have to know the practice in order to decide whether to protest against it (Blum, 1965; Danilenko, 1988; Mendelson, 1988; Villiger, 1997; Arangio-Ruiz, 2007)<sup>17</sup>. Silence contributes to the formation of the so-

---

<sup>14</sup>According to Bos: “(...) for legal consequences to ensue, there must be good reason to require some form of action (...)”.

<sup>15</sup>“(...) for customary international law is not yet another expression for prescription (...)”.

<sup>16</sup>According to Fitzmaurice: “(...) both (customary international law and prescription) depend on the establishment of a practice or usage-one general and the other particular-and each derives its eventual legal sanction from some form of consent on the part of States-either general acceptance in the one case, and in the other specific recognition or tacit acquiescence (...) method (practice and consent) is the same (...)”.

<sup>17</sup>According to Villiger: “passive conduct can only amount to qualified silence if a State knows of the practice of the other States and of the (emerging) customary rule (...) Particularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light (...)”; contra Mendelson: “(...) admittedly today (...) States are less likely to be ignorant (...) it is certainly not the case that, even in the quite recent past, all States knew what was going on in all other parts of the world (...)”.

called interest in acting (Danilenko, 1988)<sup>18</sup>. Interest that potentially involves the rights of a State that attributes to silence the assessment of the validity of an evolving custom. This element is not problematic given that customs have a general value and affect rights but not the rights and obligations of some specific States (Mendelson, 1988), where the element of the interest in acting will be difficult to exclude (Mendelson, 1988). The length of the passage of time tends to be directly proportional to the degree and intensity of the change in custom and occurs as compared to the rule of customary law (Lauterpacht, 1957; Macgibbon, 1957). Time and silence as *opinio juris* are institutions, related notions (Baderman, 2010)<sup>19</sup>. Tacit consent is manifested only over a more or less long period of time where the length will be determined over time and necessary for the international community to be able to reject or recognize a new practice of an obligatory and binding nature (Mendelson, 1988)<sup>20</sup>.

---

<sup>18</sup>According to Danilenko: “(...) inaction could be relevant only (...) where reaction to the relevant practice is called for (...). This implies that the relevant practice ought to be one that affects the interests or rights of the State failing or refusing to act (...)”.

<sup>19</sup>“(...) sometimes a violation of a ILC norm is just that-an unlawful act that does not really purport to establish a new rule (...)”.

<sup>20</sup>According to Mendelson: “(...) the normal process of claim and response (...) some lapse of time is practically inevitable, even in these days when instantaneous communication is possible: Governments need time in which to decide what their response should be (...)”.

## **Rights, obligations and acquiescence according to Maggibbon**

Back in 1957 (and a few years earlier), the English jurist Ian Maggibbon tried to investigate the relationship between custom, acquiescence and *opinio juris* (Maggibbon, 1957). In particular, it suggests that:

“(...) the process of formation of customary rights and obligations is not the same and that only in the second case does acquiescence acquire importance for the purpose of detecting a custom (...) the role of the acquiescence would depend on the position, active or passive, that States assume when they comply with a rule of customary law (...) when a custom provides for a right and a State exercises the same without any other State opposing, acquiescence is produced (...) acquiescence, however, is not always the expression of an *opinio juris* (...) the inaction of the States in the face of the conduct of the State which, presumably, acts in accordance with a rule of customary law, could also be attributable to simple indifference or to a precise political choice (...) if the obligation in question requires the States to refrain from engaging in a conduct. In other words, when it results in a ban (...)” (Maggibbon, 1957)<sup>21</sup>.

In this spirit we recall the opinion of Korhonen:

“(...) there is also the avoidance of discussing politics in legal contexts. The legal field is protected by an intrigue of silence. The new stream on the other hand takes the Dienst more light-heartedly. They do not set out to fight with politics about their respective relevance. They discuss politics and let it try to master the power-struggle. They know that international law may serve a master, but that the master is not power or international politics. They either respect the diplomatic effort of a compromise or, more ambitiously, aim at the demolition of the oscillation between apology and Utopia. Though admitting the significance of politics, they search for other ways to avoid alienation and ground the relevance of normative practice. They admit the realistic limits, but go further to look for the openings in the situationality of the particular case or task (...) (Korhonen, 1996)”.

Maggibbon jurist positions also apply in international

---

<sup>21</sup>“(...) the case of (...) a prohibition, that is, where a rule emphasizes that a State shall refrain from pursuing a certain course of action, it is not unreasonable that emphasis should be placed on the *opinio juris* rather than on acquiescence (...)”.

jurisprudence. In the S.S. Lotus case, the PCIJ:

“(…) rejected France's position according to which only the flag State would have the right to prosecute members of a vessel's crew in case of collision with another vessel on the high seas<sup>22</sup> (…) noted that the practice of States other than the flag State of not instituting criminal proceedings against crew members in such cases was not sufficient to demonstrate the existence of an *opinio juris* and, therefore, of a customary rule (…)” (Kolb, 2014)<sup>23</sup>.

Macgibbon insists and tries to distinguish:

“(…) between acquiescence and *opinio juris* based on the distinction between customary rights and obligations (…). The acquiescence given by States in the exercise of a right cannot be classified as *opinio juris*, because it is potentially attributable for reasons that have nothing to do with the recognition of the legitimacy or desirability of a conduct (…). Acquiescence produces the same effects as the *opinio juris*, transforming a widespread practice into a habit, it will constitute a simple element from which to infer the existence of the consent of the States (…). In the process of formation of a customary law the *opinio juris* does not coincide with acquiescence but is rather a logical consequence of acquiescence (Macgibbon, 1954)<sup>24</sup> “(…) In the process of forming a customary obligation, the *opinio juris* is instead proven by the will of the States to respect a rule which requires them to adopt a certain conduct. The existence of the subjective element will be implicit here in the execution of an obligation to do or not to do that the States consider binding precisely because it is legitimate or desirable (…)” (Blum, 1965).

As can be seen, the idea of *opinio juris* of a State, i.e. the legitimacy of a customary obligation, is implicit in the fulfillment and nothing excludes that a State fulfills an obligation for reasons other than those which are considered due

---

<sup>22</sup>The S.S. “Lotus” case, PCIJ, Collection of Judgments, Series A.-No. 10, September 7th, 1927, p. 28.

<sup>23</sup>The S.S. “Lotus” case, PCIJ, Collection of Judgments, Series A.-No. 10, September 7th, 1927, p. 28.

<sup>24</sup>“The *opinio juris* in these circumstances is thus, to some degree distinct from acquiescence; but it is no more than the logical-although not necessarily inevitable-consequence of the acquiescence or implied consent which, it may be argued, would have permitted the right correlative to the obligation to be perfected in any event (…)”.

conduct, such as a position which emerges as passive conduct.

Returning to the S.S. Lotus case the search for the subjective element as existing of an objective element demonstrates how a widespread practice corresponds to a precise *opinio juris* on its legitimacy (White, Cryer, 1999). But the problem with Maggibbon's positions is that the concept of acquiescence is indistinct from intentional silence. Maggibbon affirms that:

“(...) behind the acquiescence of States, there is often a lack of real consensus. He uses the term acquiescence to mean “mere silence” (*qui tacet neque negat neque utique fatetur*). (...) Acquiescence can be defined as such and represent the *opinio juris* of a State only in the presence of a “qualified silence”, that is, a silence which, given the circumstances, can only be interpreted in the same way as a tacit consent (*qui tacet consentire videtur*) (...)” (Maggibbon, 1954).

Finally, the integration of an unwritten derogation from a general custom where the State does not invoke the application of a custom and above all in the sector of the resolution of a dispute demonstrates that the counter-party has accepted the same which has a binding nature. It is accepted as an interest in acting and as an expression of acquiescence (Gouveinhes, 2012)<sup>25</sup>.

---

<sup>25</sup>ICJ, Right of passage in Indian territory (Portugal v. India), in ICJ Reports, 1957, parr. 125, 146. The sentence of 26 May 1961 concerning the preliminary exceptions in the Temple of Preah Vihear case (Cambodia v. Thailand), ICJ Reports, 1961, par. 31. The sentence of 26 November 1984 on jurisdiction and admissibility in the case of military and paramilitary activities in Nicaragua and against Nicaragua (Nicaragua v. United States), ICJ Reports, 1984, parr. 392, 412. Nigeria contested such an interpretation by pointing out to the unenforceability pursuant to art. 59 of the Statute in its own comparisons of decisions made previously among other parties. ICJ on the preliminary exceptions of 11 June 1998, admitted that art. 59 of the Statute extended the time of judgment of the previous decision to the new judgment, in the absence of subjective identity. However, it is worth noting that the precedents in

### **Silence/acquiescence as a legal act**

Since they are recognized by the international community, the conduct of States is based on action-reaction behaviors. The conduct adopted by one State towards another assumes importance not only in the evolution of legal, political and economic relations but also in the development of modern international law (Antunes, 2006). Silence within the action-reaction system includes acquiescence behavior as one of the elements reflecting the action-reaction conduct (Marie, 2018)<sup>26</sup>. Certainly the notion of acquiescence is not easy to be recognized internationally both by jurisprudence and by practice in a univocal way (Blum, 1965). The acquiescence implies a voluntary behavior of tacit consent. In front of an active conduct of one State another or other States respond with a tacit consent. Passive conduct as part of a State produces legal effects. Acquiescence is defined as a consent that includes silence as a legally qualified conduct (Antunes, 2006). Acquiescence dates back to both the common law system and civil law from the

---

question were not without value: “In ne saurait être question d'opposer au Nigéria les décisions prises par la cour dans des affaires antérieures. La question est en réalité de savoir si, dans la présente espèce, il existe pour la cour des raisons de s'écarter des motifs et des conclusions adaptés dans ces précédents (...)”, in ICJ, Reports, 1998, par. 28.

26ICJ, Right of passage in Indian territory (Portugal v. India), op. cit., “(...) [l]e fait d'attribuer des effets légaux au silence, de voir en lui une réaction, est un mécanisme inhérent à la structure décentralisée de l'ordre juridique interétatique (...)”.

19th century<sup>27</sup>. The acquiescence presents material effects and produces procedural effects (Barale, 1965), as a positive and negative conception of conduct and as an objectivist approach that corresponds to a normative conception of acquiescence.

The effects of acquiescence as a reaction to a subjective state and after a State's conduct of silence is a significant manifestation of a precise will or intention of a decision, behavior of a State in front of a concrete reaction of another (Bentz, 1963; Kopela, 2010)<sup>28</sup>.

The voluntaristic nature entails a different conception of acquiescence before the intensity of the subjective state as a requirement of silence which produces juridical effects. The acquiescence as a positive concept (Macgibbon, 1954) requires a passive conduct which is expressed as consent: *qui tacet consenter videtur* (Macgibbon, 1954, Blum, 1965); as an effective consensus that reconstructs a basis of positive acts of the State (Perels, 1884; Fauchille, 1925; Ross, 1947)<sup>29</sup>.

Compliant silence as a positive act is not convincing. Silence is likely to produce legal effects only accompanied by an active

---

27ICJ, North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3 and the dissenting opinion of judge Ammoun, par. 22.

28According to Bentz: “(...) le silence, interprété comme une manifestation de volonté, apparaît comme l’aboutissement logique de cette théorie, attaché essentiellement à la libre recherche de la volonté interne (...)”.

29According to Ross: “(...) in all cases it is a condition that there should be real consent and not merely passivity in the face of inevitable facts (...)”; Pleadings, Oral Arguments, Documents, Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, Vol. IV, p. 605.

conduct that seems contradictory. Consent is the active result of a State where the acquiescence is superfluous, which implicitly expresses consent through an abstensive and active conduct adopted by a State in practice. The applicability of acquiescence implicitly expresses one's consent through active conduct (Fitzmaurice, 1953; Blum, 1965)<sup>30</sup>.

The positive character of the acquiescence merges with the concept of behavior which includes passive conduct which excludes silence from a State which may in itself produce juridical effects. Such a statement is interpreted as a rejection of the validity of the institution of acquiescence understood and hardly shared (Macgibbon, 1954).

The negative nature includes the inaction of one State in the face of unlawful conduct by another State (Das, 1997; Antunes, 2006; Kopela, 2010). The negative acquiescence is based on the assumption that States react to a violation of a right. The absence of concrete protests results in an active conduct with a precise meaning, where silence translates the acquiescence with certain legal effects (Macgibbon, 1954)<sup>31</sup>.

Certainly a difference is noticeable. The positive acquiescence is

---

<sup>30</sup>According to Fitzmaurice: "(...) other States have neither consented expressly, nor, by the conduct, actively implied their consent, but have simply been inactive (...)".

<sup>31</sup>"(...) acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection (...)".

noted from an active conduct while the negative one from a passive one. Not all passive conduct produces acquiescence. Circumstances and passive conduct do not produce acquiescence whenever a State remains silent. The acquiescence intentionally includes and expresses the consent of the State: *qui tacet consentire videtur si loqui debuisset ac potuisset* (Randelzhofer, Nolte, 2012).

These are circumstances that produce concrete effects of acquiescence. The circumstances take into consideration the ascertainment of the acquisitive prescription of sovereign rights over a territory that do not coincide with those committed to signaling the *tacit opinion juris* of a State in the formation of a rule of customary law. The circumstances examine and verify the acquiescence of a State during the discussion in relation to the legal effect that the passive conduct produces in practice. The circumstances are frequent and imply the very definition of acquiescence, i.e. the knowability of the conduct of others as an interest and the ability to act and the fact that silence is maintained for a certain and concrete period of time (Kolb, 2017).

The acquiescence does not require a positive formulation, such as an actual consent to produce its effects as a presumed consent. The intrinsically ambiguous conduct of silence cannot disregard an assessment of the circumstance that characterizes

the very consent of a State<sup>32</sup>. The negative acquiescence correlates with that presumption of consent. Within this circle the meaning of silence contrasts with the interpretation provided by the State concerned (Koskenniemi, 2005). The ability to objectify the subjective state of a State shows that silence represents a form of consent (Barale, 1965; De Visscher, 1967; Marie, 2018)<sup>33</sup>, as a loss of centrality of the element of consent. And even in the case where consent is presumed, it is clear that it will be reduced to a mere legal fiction as a justification of the production of the effects of acquiescence (Quane, 2014; Jeutner, 2017). Silence does not constitute the real expression of the consent of a State. It presents itself as a qualification of the subjective state, of the State which has lent acquiescence as a basic conduct to a reaction against another State. The positive conception of acquiescence produces within the spirit of silence legal effects of an exclusive nature as a manifestation of the consent of a State (Di Stefano, 2019). Instead, the negative conception is the potential motivating cause of the effects of

---

32 Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, “(...) silence may also speak, but only if the conduct of the other State calls for a response (...)”.

33According to Marie: “(...) [l]es conditions d’attribution d’un effet au silence répondant à celles de l’ensemble des comportements relevant de la catégorie des actes juridiques, il est possible de conclure que le silence manifeste une volonté. C’est alors à l’interprète impartial qu’il revient de s’assurer de la satisfaction de ces conditions au regard des faits de l’espèce. C’est à ce stade que le caractère fictif ou vraisemblable de l’artifice des explications volontaristes se mesure, i.e. au stade de l’établissement de la connaissance et de l’existence de la volonté (...)”.

acquiescence. If the State brings complaints for the illicit occupation of the territory, the cessation of sovereign rights in favor of another State is agreed. The reasons for the conduct are different and the circumstances that the judge has to evaluate ascertain acquiescence in both cases. In the case of a defect of will, the motivation pushes the State to keep the relative silence as irrelevant for the purposes of producing the effects of acquiescence.

The negative formulation it behaves as a reflection of a voluntaristic approach to the notion. It is a presumption that can produce acquiescence even in the absence of real consent. On the other hand, the positive formulation changes the intensity of the subjective state. The reality confirms, however, the existence of a silent consensus. In other words, silence is voluntary and the consent of the state is not manifested. However, the will in adopting a silent consensus does not correspond with the production of the respective legal effects.

### **The objectivist approach of acquiescence as a legal fact**

The juridical effects of the acquisition are not attributed to a concrete manifestation of will but to specific circumstances which qualify silence as a conduct of the State (Bentz, 1963; Barale, 1965; Cahier, 1968; Gauthier, 1995; Das, 1997; Copela, 2010; Kolb, 2017). That means that acquiescence is comparable

as a legal fact. The objectivist approach differs from the positive and negative conception of acquiescence, because the negative nature is assumed as reconstructed and on the basis of some circumstances where the subjective state of the State plays a central role. A role where the circumstances maintain the conduct of a will in themselves, capable of producing effects of acquiescence and does not result in a mere superfluous function. The objectivist approach implies the recognition within international law of a clearly customary norm that links the juridical effects of acquiescence to a qualified silence that cannot be linked to the subjective state (Kolb, 2017)<sup>34</sup>. Can we speak under these circumstances of a normative conception of acquiescence?

According to the voluntaristic approach, every legal system foresees a situation in which it is assumed that the existence or otherwise of a justifying fact that produces a specific legal effect is assumed. The legal fiction is not considered to be a defect of the negative conception of the conduct of acquiescence which in this case is encountered only in state behaviors and not in

---

<sup>34</sup>According to Kolb: “(...) type of acquiescence is based on a legal norm which imputes to a subject the consequences which would have flown from its acceptance of a set of facts when this subject has remained silent for a prolonged time once confronted with these facts and where there was a legal duty to react in order to uphold the position of non-opposability of these facts (...) acquiescence taken in this sense is consequently normative (...) It is therefore appropriate to call it a doctrine of Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore (...)).”

natural persons (Bentz, 1963; D'Amato, 1971; Salmon, 1974)<sup>35</sup>. The acquiescence is also distinguished from the institute of estoppel and the extinguishing prescription since these institutes play a different role in the international legal system. The acquiescence guarantees that the passive conduct of a State produces legal effects only of a voluntary nature while the estoppel and the extinguishing prescription try to protect the expectations of those subjects who have relied (Cottier, 2015; Magnùsson, 2015; Mossop, 2016; Chan, 2018)<sup>36</sup>. The elimination of the subjective element and the permanence of only the objectivist one confuses the applicability of the conception of estoppel and the rejection of the normative conception of acquiescence (Marie, 2018)<sup>37</sup>.

---

<sup>35</sup>According to D'Amato: "(...) State is of course an artificial entity; (there might be) a fundamental difference between what we as observers think a state thinks, and what the State in fact thinks, or feels, or has a conviction about (...)".

<sup>36</sup>ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984, p. 246, par. 130: "(...) the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning (...)". In the same orientation of the ICJ see: *Somalia v. Kenya*, Judgment on Preliminary Objections (2 February 2017) parr. 18.19. See the Court's judgment in *Nicaragua v. Colombia*: "(...) relates only to the delineation of the outer limits of the continental shelf, and not delimitation" (Judgment on Preliminary Objections, 17 March 2016 para 110).

<sup>37</sup>ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit., "(...) Si on rejette la volonté subjective comme fondement théorique de l'acquiescement (...) l'acquiescement devient simplement une forme assouplie de l'estoppel. L'autre partie n'aurait guère besoin de recourir aux conditions strictes de l'estoppel pour voir protégé ses intérêts. En effet, considérer l'acquiescement comme étant fondé exclusivement sur la bonne foi et la sécurité juridique reviendrait à introduire un estoppel simplifié, dépourvu de toute technicité, ou encore, à admettre l'estoppel au sens large dans l'ordre juridique international. Or, cette conception extensive (...) n'est pas désirable dans un système juridique bâti sur la coexistence de

The extinctive prescription is correlated with the unreasonable delay (doctrine of laches) (King, 1936; Cheng, 2006) which entails:

“the loss of the right of a State to settle a dispute through the courts because of the long period of time elapsed between the occurrence of the facts and the moment in which it invokes the alleged violation of international law (...)” (Wouters, Verhoeven, 2008b).

The extinguishing prescription presents two fundamental differences with the acquisitive prescription. Acquisitive prescription produces effects in consideration of the existence of the will of the State not to react in the face of the violation of its rights. The extinguishing prescription is independent of the will of the parties, i.e. the passage of time detects and produces legal effects beyond the will of the State whose rights prescribe it. The silence of the State constitutes a legal act and varies from the renunciation of one's own right to the recognition of the existence of a right of the other party. The silence of the State is a legal fact and is irrelevant and produces effects whether it is intentional or attributable to indifference, ignorance or any other cause. The acquired prescription results in the transfer of a material right and entails the loss of a procedural right. Acquisitive prescription intervenes on the right which notices the violation and is extinguished by effect of the acquiescence of the State which has undergone in silence the exercise of *de facto* sovereign powers over its territory.

ses sujets (...)”.

### **Acquiescence as a unilateral legal act**

Acquiescence as a legal act constitutes a passive and voluntary conduct according to the subjective state where the law attributes certain legal effects *stricto sensu* which coincides with the mere desire to maintain silence while the legal act corresponds to a consent, where the production of the legal effects deriving from the behavior adopted. Therefore we can characterize acquiescence as a unilateral act according to the circle of the promise, acknowledgment or renunciation that a conduct is perfected and according to the legal effects through the declaration of will of only one party (Suy, 1962; Zemanek, 1998; Kassoti, 2015).

The category of unilateral legal acts in the international legal system is the subject of a manifestly heated debate given that acquiescence occurs through the consent of a State unilaterally manifested through silent conduct (Antunes, 2006)<sup>38</sup>. We recall at that point from the ICJ the Gulf of Maine case where acquiescence is presented as a tacit recognition and expressed

---

<sup>38</sup>According to Antunes: “(...) consent tacitly conveyed by a State, unilaterally (Unilateral Acts of State in International Law), through silence or inaction (...) behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely (...)”, Guiding Principles applicable to unilateral declaration of States capable of creating legal obligations, with commentaries thereto (UN Doc. A/61/10), 2006, p. 369.

through a unilateral conduct<sup>39</sup>.

It is noted the conduct and situation that was analyzed through the International Law Commission (ILC). Indeed, within this context the Special Rapporteur Victor Rodríguez Cedeño highlighted the incompatibility between the concept of a unilateral legal act and acquiescence (Liakopoulos, 2020a)<sup>40</sup>. According to our opinion, the formalism of a passive conduct has the restrictive nature of a unilateral legal act and as a formal declaration that is formulated by a State with the intention of creating an obligation according to the rules of international law<sup>41</sup>. Silence does not translate in this case as a unilateral legal act but as conduct formalized in an inadequate way to communicate the subjective state of a State, autonomous and of

---

39ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, op cit., par. 130. “(...) [A]cquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent (...)”.

40Victor Rodríguez Cedeño, First Report on unilateral acts of States (UN Doc. A/CN.4/486), 1998 (First Report), parr. 29, 49-51; Victor Rodríguez Cedeño, Third Report on unilateral acts of States (UN Doc. A/CN.4/ 505), 2000 (Third Report), parr. 126-133; Victor Rodríguez Cedeño, Fourth Report on unilateral acts of States (UN Doc. A/CN.4/519), 2001 (Fourth Report), parr. 22-32, 53-58; Victor Rodríguez Cedeño, Fifth Report on unilateral acts of States (UN Doc. A/CN.4/525), 2002, parr. 76-78; Victor Rodríguez Cedeño, Sixth Report on unilateral acts of States (UN Doc. A/CN.4/534), 2003 (Sixth Report), parr. 17-26; Victor Rodríguez Cedeño, Seventh Report on unilateral acts of States (UN Doc. A/CN.4/542), 2004 (Seventh Report), parr. 187-223; Victor Rodríguez Cedeño, Eighth Report on unilateral acts of States (UN Doc. A/CN.4/557), 2005 (Eighth Report), parr. 196-207.

41In the Preamble of the Guiding Principles is noted that: “(...) the following Guiding Principles (...) relate only to unilateral acts stricto sensu, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international laws (...)”, p. 370.

a “reactive” nature<sup>42</sup>. Unlike what is highlighted by the ILC, the silence of a State as ambiguous conduct certainly expresses the will of a State and is released from the definition of a unilateral legal act and within the spirit of any formalism (Rodríguez Cedeño, Torres Cazorla, 2017)<sup>43</sup>. In reality, with other words, even the Special Rapporteur has accepted this interpretative path (Rodríguez Cedeño, Torres Cazorla, 2017)<sup>44</sup>.

Obviously, it is excluded that the acquiescence qualifies as a unilateral legal act since it enters the circle of action-reaction and which produces legal effects in relation to a previous conduct and not autonomously. It is held that there is a silence that does not represent a conduct but the lack of a specific conduct that does not produce legal effects, namely: *qui tacet neque negat, neque utique fatetur*. Unilateral acts are characterized by their own autonomy and produce legal effects independent of any conduct of others, given that acquiescence cannot be considered in this case as a unilateral legal act

---

<sup>42</sup>Victor Rodríguez Cedeño, First Report on unilateral acts of States (UN Doc. A/CN.4/486), “(...) silence, in spite of being unilateral, is not an act or an autonomous manifestation of will, and it certainly cannot constitute a formal unilateral legal act in the sense that is of interest to this report. It seems difficult to equate silence with a formal declaration and to apply to it specific rules different from those established in relation to the law of treaties (...)”.

<sup>43</sup>According to: Víctor Rodríguez Cedeño, Torres Cazorla: “(...) a unilateral act of State may be defined as an expression of will emanating from one State or States which produces legal effects in conformity with international law (...)”.

<sup>44</sup>“(...) unquestionably, silence is a mode of expression of the will of a State which may provide significant legal effects even though its meaning may be undetermined (...)”.

(Barale, 1965; Rodríguez Cedeño, Torres Cazorla, 2017)<sup>45</sup>. Unilateral legal act where silence cannot produce the same legal effects as a unilateral legal act<sup>46</sup>, given that the recognition and the waiver are unilateral legal acts where a State recognizes the legitimacy of a conduct and of a factual situation where the renunciation of exercise occurs when a State reacts to the occupation of its territory or the violation of a rule of international law. Silence thus has the same character with acknowledgment and renunciation by not integrating the unilateral juridical act (Mann, 1898; Schwazrzenberg, 1955; Suy, 1962; Brownlie, 2019).

### **Is acquiescence a “legal phenomenon”?**

The notion of a legal act as a restrictive one and understood as a

---

<sup>45</sup>According to Victor Rodríguez Cedeño: “(...) [s]ilence cannot be considered an autonomous manifestation of will, since it is a reaction. Silence or inaction must be perceived in relation to a pre-existing or contemporaneous attitude on the part of another subject”; Victor Rodríguez Cedeño, Seventh Report, op. cit., par. 189, “(...) silence as such usually has legal consequences if it is related to a prior act on the part of another subject; the Special Rapporteur therefore inclines towards the position (...) whereby silence, since it cannot produce legal effects independently and requires another act in order to do so, does not come under the definition of unilateral engagement (...)”. According to Barale: “il est certain que l’acquiescement est trop étroitement lié, quant à sa formation, aux actes ou aux prétentions de l’autre partie (...) pour que l’acquiescement puisse être dans la majorité ces cas, regardé comme un simple acte unilatéral (...)”.

<sup>46</sup>According to Victor Rodríguez Cedeño: “(...) in case involving waiver, protest or recognition, it might be thought that the State can certainly formulate a legal act by means of silence”; Victor Rodríguez Cedeño, Fourth Report, op. cit., par. 24, 30; Victor Rodríguez Cedeño, Sixth Report, op. cit., par. 26; Victor Rodríguez Cedeño, Seventh Report, op. cit., par. 215-216; Victor Rodríguez Cedeño, Eighth Report, par. 206. ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit. noted the attitude like: “equivalent to tacit recognition (...)”.

legal transaction (Basdevant, 1936; Reuter, 1961) put the term silence in ambiguity, i.e. not verifying the effects produced by the conduct of a State which correspond to its will. This objection accepts the validity of the acquiescence which produces legal effects through the relative silence. It also produces different effects which present an undoubted conceptual and specific autonomy and not a construction devoid of juridical value. The concept of acquiescence is useful to be framed in an expression of the complex phenomenon of passive conduct which is characterized by certain circumstances where the State produces intentional juridical effects in the face of certain conduct and through silence. The voluntary silence of a State means abstention from protest against the violation of a right or a conduct where silence produces legal effects such as, for example, the transfer of sovereignty rights over the territory, the practice or the *opinio juris* in the formation of a customary rule, the modification of a treaty (Corten, Klein, 2011), and as a consequence the renunciation of the international responsibility of a State. Thus acquiescence is a legal phenomenon that defines the adoption of a passive conduct in a precise context that produces legal effects.

The *opinio juris* and its voluntaristic conception postulates the maintained silence of each State before a rule of customary law is perfected through qualified silence capable of producing

acquiescence (Hudson, 1943; Danilenko, 1988; Wolfke, 1993)<sup>47</sup>. No State can deny the general value of customs (Kelsen, 1966). Every time a State refrains from taking a position in the face of a reaction, it means that it accepts this practice as binding<sup>48</sup>. The silence maintained by a State in the face of a conduct has no effect whatsoever in the process of forming a new custom. The silence of a State detects a subjective element as an objective element of a custom, increasing thus the amount of practice of the ongoing rule.

### ***Jus cogens and the limits of acquiescence***

The manifestation of acquiescence corresponds to an illegality (Macgibbon, 1954; Orakhelashvili, 2006), so the doctrine has characterized it as a validation device whose main function is the stability and certainty of international juridical relations according to the action-reaction model (Marie, 2018)<sup>49</sup>. Acquiescence involves the transfer of sovereign rights of one State to another by validating an illegitimate situation.

According to art. 45 (b) Draft of Articles on the International

---

<sup>47</sup>According to Hudson: “(...) the elements necessary (to the formation of customary law) are the concordant and recurring action of numerous States (...), the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time (...)”.

<sup>48</sup>“(...) In short, the consent or genuine (not fictitiously postulated) acquiescence of some States is necessary for a customary rule to come into being at all (...)”.

<sup>49</sup>“La pertinence légale du silence (...) se justifie précisément afin d’anticiper une indétermination future ou de remédier à une indétermination actuelle des rapports de droit (...)”.

Responsibility of the State (ARSIWA) (Liakopoulos, 2020a) the waiver opens the way for international responsibility for a tort as a protest against the violation of a rule for a significant period of time which may suppose that the same has decided to withdrawal his right. This legal effect is based on the codification of art. 45 (b) Vienna Convention on the Law of Treaties (CVLT) (Fitzmaurice, Merkouris, 2020; Liakopoulos, 2020a)<sup>50</sup> where the waiver declares invalid and terminated the withdrawal and suspension of a treaty for a cause falling within the circle of articles 46-50 and 60-62 CVLTs (Corten, Klein, 2011; Guliyev, 2017; Buga, 2018; Merkouris, Kammerhofer, Arajärvi, 2022).

Therefore acquiescence produces the violation of a rule of the system of sources of international law where the principle *ex iniuria non oritur jus* has no basis, just as the same thing does not happen in internal legal systems. The formation of a customary norm is sanctioned through the conduct of acquiescence and within the spirit of the international community. Within this context also, the Vienna Convention on the Law of Treaties provides that a treaty can be modified (art. 39) (Nolte, 2013), or terminated (art. 54 (b)) (Buga, 2018) due to the conduct of acquiescence and with respect to a violation

---

<sup>50</sup>Vienna Convention on the Law of Treaties, 13 May 1969, UNTS 1155, 331 (VCLT).

thereof. Therefore, these juridical effects find their limit in the *jus cogens* (Danilenko, 1988; Marie 2018) since acquiescence cannot remedy the violation of a rule of *jus cogens* (Henry, 2017)<sup>51</sup>. These rules protect the interests of individual States and of the international community and a State cannot thus freely dispose of and produce an acquisitive prescription through recourse to the use of force, or of the violation of the principle of self-determination of peoples (Kohen, 2003)<sup>52</sup>.

The renunciation of a State to invoke international responsibility towards another State due to the violation of a rule of *jus cogens* has no effect (Orakhelashvili, 2017)<sup>53</sup>. The parties involved cannot tacitly modify the content of a treaty contrary to a rule of *jus cogens* according to art. 53 CVTL (Buga, 2018; Merkouris,

---

51“(…) acquiescence (…) irrespective of the status accorded to [it] by international law (…) follow[s] from the fundamental principles of good faith and equity (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment) [1984] ICJ Rep 246, 305 130) (…) it is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. The inaction of a state faced with alleged violations of international law by another state can have, mainly, two distinct sets of legal implications: first, it can affect subjective rights and obligations of the acquiescing state (…) under the law of state responsibility, once a finding of acquiescence has been reached, the effects are direct and immediate: the acquiescing state loses its right to reparation. Acquiescence in this context is thus limited to the creation, modification or extinction of rights and obligations in bilateral relationships (for example, two neighbouring States that have concurrent titles on a given portion of territory, or the author of a wrongful act and its victim) (…)”.

52“(…) one could expect to obtain clear-cut statements in order to show that a rule in general, and especially one of the importance of that related to the use of force in particular, has changed (…)”.

53According to A. Orakhelashvili: “(…) prescription could (…) apply only where the nature of legal relations so permits, that is where the development of that relation depends on the view of involved States only and does not entail any conflict with public order considerations (…)”.

Kammerhofer, Arajärvi, 2022). Within this bilateral perspective of the acquisitive prescription (Batson, 2022) the renunciation of invoking the international responsibility of a State or the law of treaties is an exception bordering on *jus cogens* (Linderfalk, 2020). In this case, it is desuetude since it seeks to modify or abrogate a rule of *jus cogens* (Bradley, Gulati, 2010; Helfer, Wuerth, 2016)<sup>54</sup>. This perspective admits the possibility that a rule of *jus cogens* can modify or abrogate a rule of the same rank and within the formation of a custom where the rule of *jus cogens* sanctions the acquiescence of the international community (Cassinis, 2020). The legal effects of acquiescence thus heal the violation of a *jus cogens* rule (Sommerfeld, 2019).

Shaw noted:

“(…) that custom “reflects the characteristics of the decentralized international system (…)” (Shaw, 2017). What divides a large number of scholars is the clarification of the operation and nature of customary law, which is based on two conflicting theories, that of the implied agreement and that expressed by the Statute of the ICJ, through article 38, par. b. (…)”

54“(…) for custom, in contrast, it is widely agreed that a universal rule arises even when many or even most states do nothing. These nations are said to “tacitly accept” or “acquiesce” in an emerging rule; their consent may be “inferred” from silence, if their consent is in fact required. These assumptions, which make the development of universal custom markedly easier, hold true for both traditional and modern forms of custom. “Traditionally, customary law has been made by a few interested states for all” (...) the process unfolds inductively, building up from specific examples of affirmative practice. “The awareness and opinions of other states that take no overt position are rarely considered” (...) Modern custom flips this analysis, applying a deductive process that begins with assertions of *opinio juris* rather than discrete instances of practice. The result in either case is the same: a universally applicable binding rule of international law (...)”. According to Bradley, Gulati: “(...) a nation may have some ability to opt out of a rule by persistent objection to the rule before the time of its formation (...) but once the rule becomes established, nations (...) never have the right to withdraw unilaterally from it (...)).

(Crawford, 2012; Thirlway, 2014; Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019; Liakopoulos, 2020c)

The first of the two claims that the custom: “(...) is the result of the (implicit) consent of the States, which has the same characteristics as a binding agreement (...)” (Reuter, 1968). This theory, which finds supporters mainly in the voluntarist school, implies that only the States that took the lead in the production of a customary rule and then consented to it are bound by customary rules. Naturally, this view raised various objections (Corten, 2006). We mainly refer to its inability to explain that the new States, from the moment of their creation and without expressing their express will, are automatically subject to international law. On the other hand, it was argued that if the above theory is accepted, in order for international customary law to become effective,

“(...) the consent of all States would be required, a fact that was possible in earlier times, when the number of States was small, but, rather, impossible with today's data (...)” (Corten, 2006).

If every *jus cogens* rule-contrary practice was considered capable of leading to the emergence of a new one, there would be no stability in the international legal order (Talmon, 2015).

Antunes agrees:

“(...) with the view that the “universality” of *jus cogens* is what poses insurmountable difficulties in the attempt to correlate tacit consent (acquiescence) with the possible violation of these rules (...)” (Antunes, 2006).

*In finis*, *desuetudine* is not an autonomous institution within the circle of action-reaction and in the process of habit formation. In

this case, silence plays the abrogation of a customary rule as an objective rather than a subjective element. Faced with an obligation to act, the international community begins to abstain from adopting a conduct where the inertia of States can be interpreted as the abandonment of a practice recognized as legitimate and as a manifestation of a new practice in progress. Desuetude presents itself as the only hypothesis where acquiescence produces effects in the face of the violation of a *jus cogens* rule (Talmon, 2015; Merkouris, Kammerhofer, Arajärvi, 2022). The *ius cogens* rule can be modified or abrogated by a rule of the same rank (Higgins, 1993)<sup>55</sup>. The substitution of a *jus cogens* rule can be sanctioned by acquiescence (Orakhelashvili, 2006).

### **Acquisitive prescription in international law**

Acquisitive and extinctive prescription are the effects of the formation or destruction of a right over the time (Salmond, 1913). The extinguishing prescription, on the one hand, translates into a principle that is based on international jurisprudence which reconnects the extinction of the right to establish a dispute before an international judge during the time.

---

<sup>55</sup>According to Higgins: “(...) [a] norm that is *jus cogens* cannot be limited or derogated from by agreement between States (...) but that is not to say that these proscriptions would somehow retain their normative quality if the world community as a whole did not regard them as such (...)”.

It produces procedural effects and does not rely on the enforcement of acquiescence. Acquisitive prescription, on the other hand, is a manifestation of acquiescence and produces the related material effects. This notion intervenes and entails the transfer of the existence of a certain right. In reality, the acquisitive prescription integrates the acquisition of the right of sovereignty over a territory that belongs to a different State when it exercises *de facto* sovereignty over that territory for a certain period of time (Johnson, 1950; Shearer, 2007).

Acquisitive prescription produces effects by sanctioning the legitimacy of a conduct in violation of international law adopted in good faith and within a closed circle of requirements that must be satisfied. This type of requirement completes the definition of the acquisitive prescription and provides an in-depth description. Acquisitive prescription differs from occupation despite the fact that in both cases a State acquires sovereign rights through the exercise of *de facto* sovereign powers over a certain territory (Macgibbon, 1953)<sup>56</sup>. The occupation takes place only on a territory that is not already subject to the sovereignty of another State (Johnson, 1955; Jennings, 1963; Blum, 1965; Lesaffer, 2005). The practical

---

<sup>56</sup>According to Macgibbon: "(...) the purpose of protests is to reserve the rights of the protesting State. To be effective (...) the protest must be directed against the violation of a right (...) where territory is ownerless, no State has a right in relation to the territory which would be infringed by its occupation by another State: hence there would be no legal basis for protest (...)".

application is lost given that the exception of the polar regions, for example, falls under the sovereignty of some State. The occupation allows the acquisition exclusively on land, in the sea and in the subsoil while the acquisition prescription allows a State to extend its sovereignty also on areas of high sea facing the territorial sea (Beckett, 1934; Johnson, 1955)<sup>57</sup>.

A State cannot occupy an area of the high seas since it qualifies as *terra nullius* but as *res communis omnium* (Johnson, 1955; Chantal Ribeiro, Loureiro Bastos, Henriksen, 2020). Within this circle, a State cannot annex a portion of the high seas to its territorial sea through the exercise of certain *de facto* powers of a sovereign nature. A State does not exercise sovereignty rights on the high seas while inland enjoys various freedoms such as the freedom of navigation, fishing and scientific research. If the high seas are in an acquisitive prescription it is equivalent to admitting that all States can lose some rights in favor of a single State (Johnson, 1955)<sup>58</sup>. It is not a question of a real transfer but of acquired sovereignty rights which would not coincide with

---

<sup>57</sup>According to Johnson: “(...) only through prescription (...) can a State establish a claim to a maritime belt wider than that allowed by general international law [or] a claim to establish a system of delimiting its maritime belt different from that laid down by international law (...)”.

<sup>58</sup>“(...) when a State is building up a prescriptive claim to land territory, it is doing so by exercising its authority over the area at the expense of one other state only; when, however, a state is building up a prescriptive claim to sovereignty over the waters of the high seas, it is doing so by exercising its authority over the area at the expense of the entire community of states. The result is the same: a title is obtained valid *adversus omnes* (...)”, pp. 350-351.

those already ceded by other members of the international community according to the principle *nemo id jus quod non habet amittere potest* (Klein, Parlett, 2022). The extension of sovereignty rights to an area of the high seas does not depend on the acquisitive prescription of the same but on the development of a rule of customary law (Gioia, 2013).

Acquisitive prescription is also distinguished from immemorial possession (Batson, 2022). The latter is noted when a State has exercised its sovereignty over a certain territory for a long time and it is not possible to trace a juridical title that justifies this possession. If the exercise of sovereignty over that territory goes back to the legal title that justifies such possession, it is impossible, as a valid title and as a violation of the law given that it has been assumed as *omnia praesumuntur rite esse acta* (Johnson, 1955; Chantal Ribeiro, Loureiro Bastos, Henriksen, 2020).

The exercise of *de facto* sovereign powers over a certain territory by another State involves a transfer of sovereign rights. The distinction and acquisition of the territory is legitimate and it has been consolidated with the passage of time (Wouters, Verhoeven, 2008b). The acquisition of the territory arising from a violation of international law in the acquisitive prescription is remedied by the acquiescence of the interested States creating a title of historical nature against a judgment (Johnson, 1955).

An instance of an immemorial possession tends to be confused with the acquisitive prescription especially in front of a territory that is presumed legitimate and its legitimacy is not demonstrated. The immemorial escapes the limitation of the exercise of sovereign powers over a territory for a longer period of time than that considered necessary given that the acquisitive prescription produces its effects (Duxbury, 2016). The difference between acquisitive prescription and immemorial possession has to do with the duration of the exercise of *de facto* sovereign powers over a territory (Verykios, 1934; Jonhson, 1955; Klein, Parlett, 2022).

The acquisition of legitimacy over a territory is strengthened proportionally to the length of time and in the exercise of sovereign powers over it. Thus the possession of a territory by a State becomes greater and thus the greater the probability that such possession was or has become legitimate. The concept of acquisitive prescription includes both that of immemorial possession and that of acquisitive prescription recalling the words of Hersch Lauterpacht:

“(...) the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international law (...)” (Oppenheimer, Lauterpacht, 1955).

### **(Follows): History of the institute**

*American Yearbook of International Law-AYIL, vol.1, 2022*

*Usucapio* is a method of acquiring an original right in rem over a certain asset (Johnson, 1955, Blum, 1965; Wouters, Verhoeven, 2008b). The *usucapio* is considered as owner after the possession of title and in good faith of a movable property for a certain period of time. *Usucapio* is used in both civil and common law and explains the impulse towards the recognition of acquisitive prescription in international law by accepting the validity of the prescription in the absence of a temporal term which represents a real contradiction (Wheaton, 1866; Phillimore, 1879; De Martens, 1883; Rivier, 1896; Westlake, 1910; Hershey, 1912; De Vattel, 1916; De Louter, 1920; Lawrence, 1923; Hall, 1924; Lindley, 1926; Ortolan, 1932; Verykios, 1934; Blum, 1965; Hartzenbusch, 1993; Charf, Day, 2012; Gozie Ogbodo, 2012; Carreau, 2018; Zimmermann, Tams, Oellers-Frahm, Tomuschat, 2019; Song, 2021)<sup>59</sup> given that the acquisitive prescription interprets a collective interest as a right sanctioning and legitimate in a real situation which is based on an unlawful conduct: interest *rei publicae ut sit finis*

---

<sup>59</sup>According to De Martens: “(...) prescription is a matter of municipal law, hence it cannot be applied as between kings or as between free and independent nations; (...) for it is impossible to acquire by usucaption or prescription things which cannot become property, that is, which are not susceptible of possession or of quasi-possession and which cannot be alienated (...)” and according to Blum: “acquisitive prescription [is] a highly controversial concept which, for my part, I have the greatest difficulty in accepting as an established institution of international law (...)”. ICJ, Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, ICJ Reports 1992, p. 351 (Land, Island and Maritime Frontier Dispute), Separate Opinion, par. 99.

*litium* (Johnson, 1955; Kolb, 2017).

Also in this case, international jurisprudence helps in the interpretation and application of the acquisitive prescription in the resolution of disputes and the use of force<sup>60</sup>.

### **Acquisitive prescription and *sine qua non* conditions**

The inertia of a State as behavior of conduct of one State towards another has the consequence of being hypothesized as a negative concept (Blum, 1965). Indirect acquiescence and through the circumstances of silence are conditions that convert

---

<sup>60</sup>See in argument: Arbitral award between Portugal and the United Kingdom, regarding the dispute about sovereignty over the Island of Bulama, and over a part of the mainland opposite to it, 21 April 1870, UNRIAA, Vol. XXVIII, p. 131; The Alaska Boundary Case (Great Britain, United States), 20 October 1903, UNRIAA, Vol. XV, p. 481; The Guiana Boundary Case (Brazil, Great Britain), 6 June 1904, *ibid.*, Vol. XI, p. 11; The Grisbådarna Case, Norway v. Sweden, Award of the Tribunal, CPA, 23 October 1909, p. 1; The Walfish Bay Boundary Case (Germany, Great Britain), 23 May 1911, UNRIAA, Vol. XI, p. 263; The Chamizal Case (Mexico, United States), 15 June 1911, *ibid.*, p. 309; *Cargill, Inc v Mexico* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009) 75: “(...) acknowledge[d] that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted (...)”. *Honduras borders* (Guatemala, Honduras), 23 January 1933, *ibid.*, p. 1307; *Dubai-Sharjah Border Arbitration* (1981), 91 ILR, 543; *Sovereignty and Scope of the Dispute* (Eritrea and Yemen), 9 October 1998, UNRIAA, Vol. XXII; *Arbitration between Barbados and the Republic of Trinidad and Tobago*, relating to the delimitation of the exclusive economic zone and the continental shelf between them, 11 April 2006, *ibid.*, Vol. XXVII, p. 147; *Military and paramilitary activities in Nicaragua* (Nicaragua v. United States), precautionary measures, ordinance, 10 May 1984, ICJ Reports 1984. In the same orientation was expressed also judge R. Ago in the separate opinion alleged in the sentence which is stated that: “(...) It can never be sufficiently emphasized that acceptance of court compulsory jurisdiction on the basis of art. 36, par. 2 of ICJ Statute is a sovereign, voluntary act the effects of which are strictly confined to the limits within which it was conceived and intended (...)” (par. 83). see also the dissenting opinion of Abraham, *parr.* 11-17.

the latter into a presumption of acquiescence with certain effects. Not every silence means an immediate violation of one's sovereign rights entailing a transfer and the exclusion of the illicit that requires the conduct of both States that meet the requirements, qualifying thus the situation as an acquisitive prescription (Johnson, 1955)<sup>61</sup>.

### **Effectiveness, continuity and publicity v. exercise of *de facto* powers**

Acquisitive prescription includes the exercise of *de facto* sovereign powers over a certain territory belonging to a certain State against another. This element presents *de facto* sovereign powers over a territory which must have an effective, continuous, public and qualified character as *animus occupandi*. The requirement of effectiveness of the exercise of *de facto* powers results in the political, military or administrative control of a State over a territory subject to the sovereignty of others (Blum, 1965). The effectiveness of the exercise is not sufficient for the existence of a historic title<sup>62</sup>. The exercise of sovereign powers over a certain territory by one State towards another constitutes passive proof in the face of conduct that harms its

---

61“(...) display of authority by the one party, acquiescence in that display by the other party – those are the sine qua non of acquisitive prescription (...)”.

62“[I]t is not effective control *per se* that forms the legal basis of [a] title. The mere fact of physical possession or effective control is in law (...) devoid of any legal significance”, *ibid*.

rights (Macgibbon, 1953)<sup>63</sup>. In the event of missing and effective control over a territory, no sovereign right can be transferred from one State to another (Blum, 1965).

Within this circle we recall the Island of Palmas case, where the United States and the Netherlands contended for sovereignty over the island of Palmas which was located south of the Philippines (Jessup, 1928; Song, 2021)<sup>64</sup>. The arbiter Huber refused the US application despite their claim of legitimacy to the 1989 Treaty of Paris stating that a title acquired by effective control must override a discovery of territory dating from the time that territory was in the hands of Spain and then to the United States<sup>65</sup>.

In the Pulau Ligitan/Pulau Sipadan<sup>66</sup> case, the ICJ underlined

---

63“(…) [T]he effectiveness of State authority displayed by the State putting forward an historic claim is relevant precisely to the extent to which it is capable of supplying evidence of other States’ acquiescence in a situation which has given rise to the formation of such title (…).”

64Island of Palmas (or Miangas) (Netherlands v. United States of America), Permanent court of arbitration, sentence of Huber of 4 April 1928, in RSA II, pp. 831-871.

65See, *Affaire de l’île de Clipperton (Mexique contre France)*, 28 January 1931, UNRIIAA, Vol. II, p. 1105, p. 1110; *Legal Status of Eastern Greenland*, pp. 45-46 (“a claim to sovereignty based not upon some particular act or title (…) but merely upon continued display of authority involves (…) some actual exercise of display of such authority (…).”).

66ICJ, *Sovereignty over Pulau Ligitan and Sipadan case (Indonesia v. Malaysia)*, in ICJ Reports, 2001, par. 38, 137, 141 the parties asked ICJ: “(…) to determine the issue of sovereignty over Pulau. They stated that “the interest of the Republic of the Borneo (...), any decision by the court, or that incidental part of decision-making in the court, which lays down an appreciation of specific treaties, evidence and support on the legal status of north Borneo will inevitably and most assuredly affect the outstanding territorial claim by peaceful means (...) the chain of title which uses to defend its territorial claim to security and liability based on its own interpretations of representations on specific treaties, agreements and other documents, is linked to the

that Indonesia's conduct:

“(…) did not imply the exercise of legislative or administrative powers over Ligitan and Sipadan islands and, as such, did not reflect the intention to act at sovereign title (…)” (Alvarez-Jiménez, 2011).

Instead, they involved the adoption of legislative, administrative and quasi-judicial acts and clearly revealed the belief that the two islands belonged to the same (Alvarez-Jiménez, 2011)<sup>67</sup>.

This line of thought also exists in the Territorial and Maritime Dispute case where the ICJ ascertained the sovereignty right of Honduras over some Caribbean islands based on the principle of effectiveness (Ziccardi Capaldo, 2012; Liakopoulos, 2020c)<sup>68</sup> and the ICJ:

“(…) listed the application of civil and criminal law of Honduras, the regulation of immigration and fishing activities, the patrolling of the coasts, the granting of oil licenses and the construction of infrastructure on the islands in question (…)” (Blum, 1965; Jayakumar, Koh, Yee, 2012; Butcher, 2013; Das, 2013; Mossop, 2016; McFadden, Train, 2017)<sup>69</sup>.

Continuous exercise is not the same as constant exercise, given that the assessment of the requirement of continuity of sovereign

---

chain of title which the Philippines relies on to defend its territorial claim to North Borneo (…)”.

67“(…) The Court notes that the activities relied upon by Malaysia, (...) are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands (...)”, par. 148.

68ICJ, Territorial and maritime dispute in the Caribbean Sea (Nicaragua v. Honduras), ICJ Reports, 2001, 6 March 2001, par. 43.

69ICJ affirms that: “(…) the “effectivités” invoked by Honduras evidenced an “intention and will to act as sovereign” and constitute a modest but real display of authority over the four islands”, *ibid.*, par. 208. Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), 29 May 2018, par. 231ss.

powers does not disregard the analysis of the characteristics of the territory. The acquisition prescription is produced on a certain territory which is easily accessible and the respect required for the acquisition of the right of sovereignty over a remote area, a small island, etc. is necessary (Blum, 1965).

The assessment of this requirement is left to the discretion of the judge and is flexible as a criterion of regularity and as a regular exercise of sovereign powers (Waldock, 1968)<sup>70</sup>. As we have seen in the Island of Palmas case:

“(...) it is not always possible to exercise effective control at any time and over any part of a territory and (...) a certain discontinuity or intermittence in the maintenance of one's rights of sovereignty can be attributable to its geographical location<sup>71</sup> (...) encountered no problems accepting the position of the Netherlands, despite the effective exercise of sovereign powers by the Dutch authorities on the island of Palmas had not been too frequent (...). The exercise, even if only modest of *de facto* sovereign powers may involve a transfer of the right of sovereignty over an isolated territory (...) difficult to reach (...)” (Zimmermann, Tams, Oellers-Frahm, Tomuschat, 2019).

In various cases (Maritime Delimitation and Territorial Questions<sup>72</sup>, Pulau Ligitan/Pulau Sipadan<sup>1</sup>, Territorial and

<sup>70</sup>“the facts that the regions are uninhabited and are susceptible only to very limited forms of human activity inevitably diminish the continuity to be expected in the exercise of sovereignty (...)”.

<sup>71</sup>“(...) although continuous in principle, sovereignty cannot be exercised (...) at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas (...)”, Island of Palmas (or Miangas) (Netherlands v. United States of America), Permanent court of arbitration, op. cit., par. 840.

<sup>72</sup>ICJ, Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain), jurisdiction and admissibility, ICJ Reports, 1st July 1994, p. 101, par. 197.

<sup>1</sup>“[I]n the case of very small islands which are uninhabited or not permanently inhabited (...) “effectivités” will indeed generally be scarce (...)”, ICJ, Pulau Ligitan

Maritime Dispute) the ICJ affirmed the same considerations in relation to the recognition of sovereignty over some islands which in practice were very distant from the mainland. Of course, these are *de facto* sovereign public powers closely related to the institution of prescription, i.e. the acquiescence of the State which undergoes the exercise of sovereign powers over a certain territory. However, if the exercise is not public, the absence of protests cannot be justified and does not constitute an expression of silent and tacit consent (Zimmermann, Tams, Oellers-Frahm, Tomuschat, 2019)<sup>2</sup>.

The publicity requirement plays a determining role relating to the element of the exercise of *de facto* powers and the silence of the State concerned and its existence is taken for granted. It is difficult to imagine a situation where the continuous and effective exercise of sovereign powers over another's territory takes place in the total awareness of the State concerned (Johnson, 1955)<sup>3</sup>. In the Island of Palmas it was specified that the exercise of *de facto* sovereign powers of the Netherlands on it had been “open” and “public”, emphasizing how a prolonged deployment of state functions on an inhabited island could not

---

and Sipadan case (Indonesia v. Malaysia), op. cit., par. 134.

2“(…) Sovereignty over minor maritime features, such as the islands in dispute [...], may therefore be established on the basis of a relatively modest display of State powers in terms of quality and quantity”, Territorial and Maritime Dispute, par. 174.

3“(…) publicity is essential because acquiescence is essential. [W]ithout knowledge there can be no acquiescence at all (...)”.

logically qualify as “clandestine” (Verykios, 1934; Johnson, 1955)<sup>4</sup> “(...) the duty of care to be aware of a circumstance of this type (...)” assuming that a State knows what happens within its borders (Macgibbon, 1953; Johnson, 1955; Kopela, 2010).

Also in the *Minquiers and Ecrehos* case, judge Carneiro observed:

“(...) France's ignorance of the activities carried out by the United Kingdom in some of the Channel Islands showed that the French authorities, unlike the British ones, exercised no effective control over them (...)” (Marie, 2018)<sup>5</sup>.

In *Certain Frontier Land* case, the ICJ affirms that:

“(...) the silence of Belgium in the face of the frequent encroachments of authority made by the Netherlands between 1892 and 1922 in some Belgian enclaves was understandable due to the objective complexity of the control of a portion of territory incorporated into another State (...)” (Marie, 2018)<sup>6</sup>.

In *Eritrea v. Yemen* case the arbitral tribunal states:

“(...) the absence of protests by Yemen in the face of the repeated patrols of some islands in the Red Sea by the Tigrinya authorities was not intentional, but must be attributed to various factors (the location of the islands, the absence of inhabitants and lines of communication, the fact that the patrols took place at night) which, taken together, suggested that the conduct of Eritrea was not public and, therefore, neither known nor knowable from

---

4According to Verykios: “on peut critiquer de même l'exigence de la publicité comme absolument inutile en droit international public, où on ne peut concevoir une possession clandestine (...)”. According to Johnson: “The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible (...)”.

5“(...) Failure to exercise such surveillance and ignorance of what was going on the islets indicate that France was not exercising sovereignty in that area (...)”. According to Marie: “on peut se demander si la connaissance prétendue de la survenance de certains faits sur le territoire litigieux permet de contribuer à la preuve de l'effectivité de la possession”, pag. 531.

6“(...) [L]e contexte géographique peut selon les cas rendre légitime l'erreur invoquée (...) L'erreur de la Belgique (...) été considérée légitime au regard des particularités géographiques des territoires en cause (...)”.

Yemen (...)”<sup>7</sup>.

***The animus occupandi***

The subjective requirement includes the *animus occupandi* as a requirement that produces the acquisitive prescription on a territory (Johnson, 1955; Blum, 1965; Lesaffer, 2005; Kopela, 2010; Gioia, 2013). Requirement that characterizes the State that exercises control over another person's territory as if it were its

---

<sup>7</sup>Eritrea v. Yemen, op. cit., parr. 301, 306, 136 and 44: “(...) there is also a problem relating to both the northern and the southern extremities of the international boundary line. The tribunal has the competence and the authority according to the arbitration agreement to decide the maritime boundary between the two parties. But it has neither competence nor authority to decide on any of the boundaries between either of the two parties and neighbouring states. It will therefore be necessary to terminate either end of the boundary line in such a way as to avoid trespassing upon an area where other claims might fall to be considered (...) there also arose a question about where to stop the boundary at its northern and southern ends, considering that in these areas it might prejudice other boundary disputes with neighbouring countries. The Kingdom of Saudi Arabia indeed had written to the registrar of the Tribunal on 31 August 1997 pointing out that its boundaries with Yemen were disputed reserving its position, and suggesting that the tribunal should restrict its decision to areas that do not extend north of the latitude of the most northern point on Jahal al-Tayr island. Yemen for its part wished the determination to extend to the latitude of 16°N, which is the limit of its northern sector. Eritrea on the other hand stated that it had “no objection” to the Saudi Arabia proposal. At the southern end, the third states concerned have not made representations to the tribunal, but the matter will nevertheless have to be determined. Eritrea was not concerned here about the arrow with which Yemen terminated its claimed line, as this arrow, according to Eritrea, pointed in such a direction as to “slash” the main shipping channel and cause it to be in Yemen territorial waters. Yemen had also used an arrow to terminate the northern end of its line and there was some discussion and debate from both sides about the propriety or otherwise of these arrows. At the southern end of the line, as it approaches the Bab-al-Mandab, there is the island of Perim. This question might clearly involve the views of Djibouti. It follows that the tribunal's line should short of the place where any influence upon it of Perim island would begin to take effect. The tribunal has taken into consideration these positions variously expressed and has reached its own conclusions, as more fully detailed in chapter V (...)”. See also: ICJ, Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), op. cit., par. 240-243.

own (Ridi, 2018)<sup>8</sup>. This is a fictitious behavior (Marie, 2018) due to the nature and circumstances that the State invokes to demonstrate an acquisitive prescription of sovereign rights.

The existence of the *animus occupandi* implicitly appears on the state functions on a certain territory which allows us to exclude some situations that are indicated by the States as the exercise of *de facto* powers (Verykios, 1934)<sup>9</sup>. The requirement of sovereign occupation has prevented territories administered by some States and on behalf of others<sup>10</sup>, or as protectorates, from being subject to acquisitive prescription by the powers which exercised *de facto* sovereign powers over them (Johnson, 1955). The lack of *animus occupandi* prevents the conduct of a State which integrates an effective exercise of *de facto* sovereign powers. We recall *ex novo* the Minquiers and Ecrehos case, where France underlined that:

“(...) over seventy-five years, the United Kingdom had not objected to the practice of the French authorities of managing lighthouses and placing buoys

---

8Order of 2 August 1932, Legal status of the South-Eastern territory of Greenland, PCIJ, series A/B, n. 48, p. 44-45. “(...) a claim to sovereignty based not upon some particular act or title (...) but merely upon continued display of authority involves (...) the intention and the will to act as sovereign (...)”.

9“(...) est absolument inutile (...) il est évident que l’exercice de la souveraineté territoriale se fait à titre de souverain, autrement on ne l’appellerait pas ainsi (...)”, p. 75.

10In reality, the United Kingdom never acquired sovereignty over the island of Cyprus based on the legal regime of limitation and according to the Treaty of Constantinople of 1878. Of course it was the administrator of this territory and recognized the Roman Empire as formal sovereign. At the same time, Austria Hungary also did not acquire sovereignty over the territory of Bosnia and Herzegovina since it administered this region on behalf of the Ottoman Empire and according to the Treaty of Berlin of 1878.

off the disputed islands (...). Such conduct could hardly reflect the intention to act as sovereign and that the silence of the United Kingdom was therefore irrelevant in the attribution of sovereignty over the islands to France (...)" (Liakopoulos, 2020c)<sup>11</sup>.

In *Tunisia v. Libya* case the ICJ denied:

"(...) that some legislative acts of Libya could reflect the intention to claim as its own a part of the continental shelf bordering Tunisia and, therefore, that the latter could not be considered to have expressed acquiescence to the claims of the Libyan authorities (...)" (Christie, 1983)<sup>12</sup>.

In *Maritime Delimitation and Territorial Questions* for example, the ICJ recognized that:

"(...) the drilling of artesian wells and the fitting out of aids to navigation (such as buoys and lighthouses) constituted the exercise of sovereign powers by Bahrain on some islands located in the Persian Gulf<sup>13</sup> (...) the provisions of *Minquiers* and *Ecrehos* where, as seen, the practice of the French authorities of positioning the buoys and managing the lighthouses, defined as of little importance in the assessment of the acquisition prescription. The conduct of Bahrain, also by virtue of the small size of the islands, was in fact susceptible, unlike that of France, to manifesting an *animus occupandi* and, therefore, could be interpreted as being *à titre de souverain* (...)"<sup>14</sup>.

The requirement of the *animus occupandi* entails an exercise of

---

<sup>11</sup>*Minquiers and Ecrechos* (France v. United Kingdom) judgment of 17 November 1953, ICJ Reports 1953, p. 47.

<sup>12</sup>See the separate opinion of judge R. Ago in case: *Continental shelf (Tunisia v. Libyan Arab Jamahiriya)*, *Tunisia v. Libyan Arab Jamahiriya*, ICJ Reports 1982, p. 37, par. 4, 92.

<sup>13</sup>ICJ, *Maritime delimitation and territorial questions between Qatar and Bahrain* (Qatar v. Bahrain), jurisdiction and admissibility, op. cit. Par. 197.

<sup>14</sup>"(...) Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain* (...). In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it (...)" ICJ, *Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Malaysia v. Singapore), op. cit., par. 120: "(...) any passing of sovereignty might be by way of agreement between the two States in question. [T]he agreement might (...) be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions (...)"

*de facto* sovereign powers over a certain territory only if a State intended to act in a sovereign capacity as a conduct pertinent to the declaration of the acquisitive prescription and carried out by the organs of the same (Johnson, 1950). It is a superfluous interpretation and the States are called to the conduct of individuals who support the instances of sovereignty over a territory (Blum, 1965). This is a tendency that justifies the theorizing of the subjective requirement of the exercise of *de facto* sovereign powers<sup>15</sup>. It is unconvincing that States have attempted to portray as sovereign the performance of their citizens' work, lives and controlled populations within the territory in question.

In Anglo-Norwegian Fisheries case, the Norway:

“(...) proof of its rights over a large portion of sea outside the territorial sea, alleged the centuries-old practice of Norwegian fishermen to go there to fish undisturbed<sup>16</sup> (...). The United Kingdom challenged the validity of this reasoning, insisting that the private activity of Norwegian fishermen could not be used by Norway to corroborate a claim concerning the acquisition of sovereignty over an area of the high seas<sup>17</sup> (...). Norway later corrected its own position, which is why the ICJ did not pronounce itself on this point (...)”.

---

15“(...) It is this tendency that justifies the consistency with which international lawyers have time and again insisted on the inclusion of this condition among the requirements laid down for the formation of a historic title (...)”.

16ICJ, Fisheries case, Judgment of December 18th, 1951, ICJ Reports 1951, p. 116, 127.

17“(...) Fishing by Norwegian fishermen in waters outside the generally recognized limits of maritime territory, even if proved from prehistoric times, is no evidence of, or basis for, Norwegian sovereignty over the waters concerned. [I]t is acts of State sovereignty, not acts of individuals, which may provide the foundation for a title to territorial sovereignty”, *ibid.*, p. 658.

In particular, judge Mo<sup>18</sup> and judge McNair<sup>19</sup> reaffirmed that the principle:

“(…) whereby the activity of individuals, if carried out autonomously for their own personal profit and without any delegation of powers by the State, does not can never produce the acquisition prescription of a territory (…)”<sup>20</sup>.

In the Kasikili/Sedudu case, Namibia claimed:

“(…) to have exercised *de facto* sovereign powers for about a century on some islands located in the Chobe River through the intermediation (indirect rule) of the Masubia population<sup>21</sup> (…). The activity of Masubia on the islands could not be considered carried out *à titre de souverain* and, consequently, Botswana did not have an obligation to protest against it (…)” (Ruda, 1991; Venzke, 2011)<sup>22</sup>.

---

18“(…) in support of her historic title, Norway has relied on habitual fishing by the local people and prohibition of fishing by foreigners. As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without out any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries (…)", according to the separate opinion of judge Ho, p. 157.

19"[A] rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them (…)", according to dissenting opinion of McNair, p. 184.

20Minquiers and Ecrechos (France v. United Kingdom), op. cit., where the ICJ did not take into consideration the activity of British fishermen on the Channel Islands and as a consequence of assigning sovereignty over them to the United Kingdom.

21ICJ, Kasikili Sedudu Island (Botswana v. Namibia) judgment of 13 December 1999, ICJ Reports 1999, pp. 98.

22“(…) It follows from this examination that even if links of allegiance may have existed (…), it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities (…)", contra: dissenting opinion of Weeramantry, par. 30 and of Parra-Aranguren, parr. 79ss. According also to the dissenting opinion of F. Rezek, par. 13: “(…) in my opinion, to deny that the indigenous occupation of the Island has any legal legitimacy and to take the view that this people lacked the necessary rights to live there “*à titre de souverain*” is an approach which would only make sense if we were still living in the first half of the century and the boundary dispute was not between the successors of Germany and Great Britain, but between the two powers themselves (…)". See also in arguments the cases of the ICJ: Land,

Principle that finds its basis in subsequent jurisprudence<sup>23</sup>.

### **Acquiescence of the State concerned. Complementarity of the two elements**

The *condicio sine qua non* as an element of the acquisitive prescription and as the absence of protests by the State which undergoes the exercise of sovereign powers on its territory are elements susceptible to the conduct of a State which can integrate an exercise of *de facto* sovereign powers. Consensus sanctions the violation of international law by converting the occupation of another person's territory into a method of transferring sovereign rights over it<sup>24</sup>. Acquisitive prescription needs converging behaviors to produce its effects. An active conduct where the State claims a territory as its own and a passive conduct which avoids the reasonable reaction as an

---

island and maritime frontier (El Salvador v. Honduras), application to intervene, judgment, ICJ Reports 1990, p. 133, par. 226; Land and maritime boundary (Cameroon v. Nigeria: Equatorial Guinea intervening) sentence of 10 October 2002, parr. 248, 262-263.

23ICJ, Maritime Delimitation and Territorial Questions, par. 236; Pulau Ligitan/Pulau Sipadan, op. cit., par. 140; Land and maritime boundary (Cameroon v. Nigeria: Equatorial Guinea intervening), op. cit., par. 194; Contra, the dissenting opinion of Carneiro, pp. 104-105: “(...) [i]n certain cases, and in certain circumstances, the presence of private persons who are nationals of a given State may signify or entail occupation by that State. [S]uch individual actions are particularly important in respect of territories situated at the border of two countries which both claim sovereignty in that region (...)” and of F. Rezek, par. 14: “(...) I nevertheless incline to the view that private persons provide perfect evidence of a peaceful occupation which deserves the protection of the law (...)”.

24ICJ, Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), op. cit., par. 120.

expectation of a type of reaction which implicitly validates the claims of others. Changing the borders between States exercises an area that corresponds to the protests of the State or States concerned<sup>25</sup>.

Every silence does not produce acquiescence and does not perfect the acquisitive prescription. According to the principle of *qui tacet consenter videtur si loqui debuisset ac potuisset*, certain requisites are satisfied given that the inertia of a State can be interpreted in a tacit consent which transfers its rights of sovereignty over a territory to another State. What are the requirements under consideration? The interest in acting: *loqui debuisset* and the ability to protest against a certain situation: *ac potuisset*.

### ***Loqui debuisset***

There is no concrete obligation for States to protest against this rule (Kopela, 2010; Marie, 2018). The offense as an optional conduct depends on the political opportunity that is perceived by the State which chooses to renounce the protection of one of its rights. The absence of protests is not without consequences. Silence in the face of violations of rules of international law

---

<sup>25</sup>Land, island and maritime frontier dispute (El Salvador v. Honduras; Nicaragua intervening), judgment of 11 September 1992, ICJ Reports 1992, p. 554. Land, island and maritime frontier (El Salvador v. Honduras), application to intervene, op. cit., parr. 68-70.

involves the transformation and replacement of the latter as a rule that replicates the illicit conduct. Acquisitive prescription as a reaction against foreign occupation of a certain territory can lead to the transfer of another State and its sovereign rights.

First of all, the State must have knowledge of the violation. The lack of knowledge does not mean that the acquisition cannot be valid. Silence should be aware given that the State can reasonably be aware of the effects that it is capable of producing. Knowledge of the violation is distinguished from motivation and the absence of protest. There is no legal relationship between these two elements. The knowledge of the exercise of *de facto* powers on one's own territory is normal and creates the presumption that the silence of the State suffers the occupation which is equivalent to a tacit consent (Di Stefano, 2019). The rationale is that the State refrain from raising a kind of objection that is irrelevant. A State avoids protesting a violation of a right that accords with the demands of the State that commits the related tort. The State may not consider exercising its sovereignty over that territory because it remains useless. The absence of protest, which is certainly a political choice, has the purpose of avoiding the fear of opposing the claims of a certain State or an international power (Blum, 1965). For example, in the *Minquiers and Ecrehos* case, France claimed that:

*American Yearbook of International Law-AYIL*, vol.1, 2022

“(…) it did not protest against the conduct of the United Kingdom so as not to damage the good diplomatic relations between the parties (Kopela, 2010). The United Kingdom retorted that France's argument was devoid of legal value, also because it could be invoked to justify any passive conduct (…). It implicitly rejected France's position, assigning sovereignty over some Channel Islands to the United Kingdom.

In the Temple of Preah Vihear case, the ICJ affirms that:

“(…) the acquisitive prescription of the Temple of Preah Vihear, located on the border between Thailand and Cambodia, in favor of the latter (Traviss, 2012; Ciorciari, 2014; Liakopoulos, 2020c)<sup>26</sup> (...) recalled a couple of episodes: the first was represented by the transmission from France (then a colonial power in Cambodia) to Siam (the ancient denomination of Thailand) of a map drawn up in 1907 by a mixed commission for establish the border between the two countries. The map showed the Preah Vihear Temple and a large surrounding area falling within the territory of Cambodia. Siam did not raise any objection in this regard”<sup>27</sup>.

It was referring to Prince Damrong's visit to the Preah Vihear Temple in 1930 as President of the Royal Institute of Siam. Prince Damrong was received by the French authorities, who acted locally in a sovereign capacity. Siam did not oppose the occupation of the Preah Vihear Temple by France<sup>28</sup>. Thailand underlined that, on both occasions, the absence of protests was due, *inter alia*, to the imbalance of power between the two

<sup>26</sup>ICJ, Temple of Preah Vihear, ICJ Reports 1961, p. 38.

<sup>27</sup>Vihear of Preah Vihear, parr. 22-23, which the ICJ affirms that: “(…) it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet allow videtur si loqui debuisset ac potuisset* (…).”

<sup>28</sup>The ICJ affirms that: “(…) looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim (…), p. 31. 118. The position of Thailandia analyzed by judge Wellington Koo in dissenting opinion, parr. 33ss.

States and the fear of challenging the presence of the French authorities at the Preah Vihear Temple could become a pretext for France to arrive at the clash and further extend its possessions in Indochina. It did not deal with this aspect of the dispute but, acknowledging the validity of Cambodia's requests, it seems to exclude that reasons of a political nature linked to the era of colonization that can influence the effects of acquiescence in the transfer of sovereign rights over a territory. Siam's silence towards what have been branded as real provocations was understandable and, therefore, excusable (Kelly, 1963; Chan, 2004; Kopela, 2010)<sup>29</sup> reaffirming its approach in subsequent jurisprudence<sup>30</sup>.

According to our opinion, the exercise of *de facto* sovereign

---

<sup>29</sup>Temple of Preah Vihear, par. 34: "(...) in view of the history of the relations between Siam and French Indo-China at the time and earlier during the preceding decades, th[is] explanation seems natural and reasonable. It was a situation not peculiar to Siam [but] the common experience of most Asiatic States in their intercourse with the Occidental Powers during this period of colonial expansion (...)", according to the dissenting opinion of P. Spender, pp. 128-129: "(...) it would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might then have been applied to highly developed European States (...) there can be little doubt that, at least in the early part of this century, Siam was apprehensive about the aspirations of France (...) this apprehension on the part of Siam, as to France's attitude towards her is a factor which cannot be disregarded in evaluating Siam's conduct-her silence, her lack of protest, if protest might otherwise have been expected of her (...)".

<sup>30</sup>ICJ, Request for interpretation of the judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), op. cit.: "(...) it is surreal to speak of the international transfer of title by acquiescence when, according to the rules and practice of the colonial Powers, it was the exercising of colonial territorial title (...) In the specific circumstances of the case, Johor could not be blamed for its silence, even if it is established that proof of the acceptance of the cession of the island exists (...)" and the Declaration of M. Bennouna, parr. 14-15.

powers on one's own territory also includes the factual error, i.e. the false representation of reality that has to do with conduct capable of producing legal effects. The existence of a factual error, as an implicit behavior of a State could try to justify its silence. But it is so? In Temple of Preah Vihear, Thailand complained:

“(...) that it did not respond to the transmission of the 1907 map because it erroneously believed that it fixed the border with Cambodia along a different line from the one drawn, placing the Temple of Preah Vihear in the Thai part<sup>31</sup> (...). It did not absolutely deny the possibility that an error could vitiate the consent of a State but, given the clarity of the map, it established that Thailand's error should be attributed to the latter's mere negligence and (...) could not be taken into account in the resolution of the dispute (...)” (Marie, 2018)<sup>32</sup>.

Instead, by error of law we mean the false representation of the legal effects of a fact perceived correctly. It is a motivation that has to do with the appearance of acquiescence in the exercise of *de facto* sovereign foreign powers over one's own territory. The absence of protests is precisely judged by the conduct of the

---

31ICJ, Temple of Preah Vihear, op. cit., p. 25.

32“(...) It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error (...)”, p. 26. See also the Case concerning the location of boundary markers between Egypt and Israel, 29 September 1988, UNRIIAA, Vol. XX, p. 1, par. 235: “(...) the principle of the stability of boundaries (...) requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error (...)”. See also the case: Legal Status of Eastern Greenland and the dissenting opinion of D. Anzilotti, p. 92: “(...) if a mistake is pleaded it must be of an excusable character and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of territory (...)”. Contra, in case: Temple of Preah Vihear, the dissenting opinion of L.M. Quintana, p. 71: “(...) it is possible to recognize expressly or tacitly a given *de jure* or *de facto* situation, but not a situation vitiated by a technical error (...)”.

other State which is not fit to support the acquisitive prescription<sup>33</sup>. The judicial assessment that has to do with sovereign rights over a territory does not disregard an objective assessment of the conduct that the mechanism of acquisitive prescription has to do with the exercise of *de facto* sovereign powers over another's territory which produces the acquisitive prescription by determining requirements that are satisfied. The existence of an error even which includes good faith cannot include any kind of consequences (Kopela, 2010; Marie, 2018)<sup>34</sup>.

The concept of knowledge as a requirement concerns the subjective dimension of the State as a direct demonstration through the analysis of the circumstances in the case. We can speak of constructive knowledge as the definition of the operation of inference of the subjective state of a State to detect and produce effects of acquiescence (Blum, 1965)<sup>35</sup>. The exercise of sovereign powers over a part of a territory by a State

---

33ICJ, Pulau Ligitan and Sipadan case (Indonesia v. Malaysia), op. cit.; Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), op. cit., parr. 233-234.

34According to Marie: “(...) [l]’excuse de l’erreur de droit n’est pas recevable et n’est jamais légitime dans le mesure où la connaissance du droit est toujours présumée de manière irréfragable (...)”.

35According to Blum: “(...) often than not, it is virtually impossible to prove a State’s actual knowledge of a given territorial situation. Consequently, international law has to satisfy itself by resorting to the concept of constructive knowledge, thus substituting an inference based on the conduct of States and the general circumstances surrounding a situation for an express proof of actual knowledge (...)”.

will be knowable because it satisfies the requirement of publicity. International jurisprudence has rejected the position that the occurrence of the acquisitive prescription is subject to the notification of the adoption of an active conduct to the State which suffers the protest of the occupation of its territory or other violation of its sovereign rights (Macgibbon, 1953; Marie, 2018)<sup>36</sup>.

Within this circle the interest in acting is also included in the formation of every silence that assumes importance due to the maintenance by one or more States that have an interest in acting. This element is identified on the basis of political, economic, etc. interests. which enter into the transfer of sovereign rights over a territory. The absence of protests leads to the crystallization of a historical title, attributable to the State in consideration of its own interests in the face of the conduct of others (*loqui debuisset*) which for certain reasons has preferred acquiescence. The interest in taking action is ascertained in relation to the birth of a historical title where the legitimacy is based on the rule of a customary nature. Acquisitive prescription poses no particular problems. The State has an interest in acting and suffers from the exercise of *de facto* sovereign powers over

---

<sup>36</sup>Island of Palmas (or Miangas) (Netherlands v. United States of America), Permanent court of arbitration, op. cit., par. 868; Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit., par. 131; Pulau Ligitan and Sipadan case (Indonesia v. Malaysia), op. cit., par. 649-650; Land, island and maritime frontier (El Salvador v. Honduras), application to intervene, op. cit., par. 282-283.

its territory. The verification of this requirement, of the interest in taking action, will be superfluous and implicit in the addressee of the violation of sovereign rights.

### *Ac potuisset*

A State must find itself in the material conditions to protest and convert its silence into acquiescence (Kopela, 2010). Protest as a capacity includes the peaceful exercise of *de facto* sovereign powers. Acquiescence translates intentional conduct into a silence maintained by a State in the face of a violation of its voluntary rights free from interference. The absence of protest is not likely to integrate acquiescence when obtained fraudulently by bribing an organ of the State or extorted by force (Macgibbon, 1953). The verification of this hypothesis occurs in practice and is unlikely given that a State can successfully invoke a legal claim to justify the adoption of a passive conduct in the face of the exercise of *de facto* sovereign powers on its territory. The fear of the consequences caused by a protest against the unlawful conduct is not relevant for ascertaining the legal effects of the acquiescence (Kopela, 2010; Marie, 2018)<sup>37</sup>. In the Frontier Dispute case the ICJ affirms that:

---

<sup>37</sup>According to Marie: “(...) les juridictions excluent que des contraintes autres que la contrainte armée puissent “viciar le consentement” d’un État (i.e. empêcher la pertinence d’une réaction silencieuse) (...)”.

“(…) to be able to take into account the absence of protests from the Governor of French Sudan (now Mali) following the receipt, by the Governor of French West Africa, of a map with which the administrative boundaries between French Sudan and Upper Volta (present-day Burkina Faso)<sup>38</sup> were established, the Governor of French Sudan was reporting to his military superior and, even if he had wanted to, could not have questioned the contents of the map (…). He expressly refer to the bond between free will and acquiescence<sup>39</sup>. The absence of protests by the Governor of Sudan was examined as the conduct of an individual and not of an organ of the State and moreover in a peculiar context in which the parties to the proceedings were then simple administrative departments under the sovereignty of a sole colonial power (…)” (Kolb, 2014).

In the Eritrea v. Yemen case the ICJ affirms:

“(…) it has not been opposed the oil extraction activity carried out by Yemen near some islands located in the Red Sea because at the time it was torn apart by a violent civil war and, therefore, unable to concentrate time and resources to deal with what was perceived as a matter of secondary importance<sup>40</sup> (…)

accepted the request of Eritrea, highlighting that equating the silence maintained by Ethiopia in similar circumstances with acquiescence would have constituted a completely unreasonable solution (…)”<sup>41</sup>.

### **(Follows): The period of time**

The time period is important and a building block for the meaningful adoption of both active and passive conduct. The international legal system does not include and foresees a fixed time as a limit where after the expiry the silence of a State,

---

<sup>38</sup>ICJ, Land, island and maritime frontier (El Salvador v. Honduras), application to intervene, op. cit., par. 80.

<sup>39</sup>“(…) [I]t is difficult to see how the idea of acquiescence, which presupposes freedom of will, can arise (…)”.

<sup>40</sup>Eritrea v. Yemen, op. cit., par. 415.

<sup>41</sup>“(…) Ethiopia was then locked in its final struggle with the Eritrean liberation movement, the Mengistu regime was close to collapse, and to suggest that Eritrea today should be taxed with Ethiopia’s failure during that period to find and protest the terms of the agreement may be unreasonable (…)” and Eritrea affirms that: “(…) knowing it would soon lose its entire coastline to the soon-to-be independent Eritrea, Ethiopia would have had no reason to protest Yemeni concessions (…)” , par. 70.

sanctions the exercise of *de facto* sovereign powers on its territory. Acquisitive prescription involves the effectiveness of the exercise of sovereign powers, the existence of investments, the good faith of the parties and the intensity of the silence maintained by the State concerned (Fauchille, 1925; Kolb, 2016)<sup>42</sup>.

The passage/period of time does not have conceptual autonomy but is implicit in the characteristics of the elements that make up the institution of acquisitive prescription (Verykios, 1934). The exercise of *de facto* sovereign powers should be continuous and explained with regularity to interpret the conduct of the acquisitive prescription on a territory. The element of acquiescence encompasses the idea that the absence of protest should be prolonged to reflect the existence of tacit consent. The State which has undergone the exercise of *de facto* sovereign powers should be able to prove the reaction of a valid reason, the length of time until such time will be irrelevant. The passage of time does not integrate the influence on the legitimacy of a historical title acquired on the basis of the mechanism of

---

42According to Fauchille: “(...) l’opinion dominant est qu’en l’absence de loi positive il est impossible de fixer un délai: celui-ci doit varier dans chaque cas, avec les circonstances, c’est-à-dire selon la plus ou moins grande importance ou l’éloignement plus ou moins grand du territoire possédé, d’après la manière dont les actes de possession ont été pratiqués, suivant la position dans laquelle se trouvent les parties intéressées (...)”.

limitation (Verykios, 1934; Kolb, 2017)<sup>43</sup>.

The passage of time needs an element of great probative value in ascertaining the acquisitive prescription. This includes the presumption of being able of *de facto* sovereign over another's territory and where the State should have opposed the violation of its sovereign rights and has lent acquiescence (Blum, 1965; Marie, 2018)<sup>44</sup>. The past period of time is an irreversible presumption which contributes to the emergence of the acquisitive prescription, to the passage of a long period of time which consolidates the idea and the effects that are actually materialized. The passage of a long period of time between the adoption of the active conduct and the interruption of the passive one represents the judgment of the instance for the acquisition of sovereign rights over a disputed territory (Blum, 1965)<sup>45</sup>.

---

43“(…) [W]hat is usually referred to as the “historic element” or “time factor” in the establishment of an historic title is no more than the sum total of all those considerations which form the components of an historic claim and its contributory factors, all of which would in themselves be rather meaningless if they were not sanctioned by the efflux of time (…)”. According to Kolb: “(…) prescription in international law is not a matter of time, but a matter of acquiescence and legitimate expectations in the stability of things consolidated over time. Time is inherent in this consolidation; but it does not appear as a separate and tangible legal requirement (…)”.

44“(…) [T]he role and primary function of the time factor in the formation of an exception territorial title in international law is to raise a presumption of acceptance of the new and exception situation on the part of the affected States (…)”.

45“(…) [T]he time factor is, in itself, completely irrelevant from the legal point of view and neither creates nor determines any substantive legal rights. It is as the same time of immense evidentiary value, making up for the lack of evidence of recognition by the affected States of the practice in question. It is the time element which most forcefully raises the presumption of acquiescence, to be inferred from an alleged exercise of authority by the claimant State, in the face of which the adversely affected

### **The good faith**

Acquisitive prescription includes the good faith of a State exercising *de facto* sovereign powers over another's territory as an indictment behavior (Hall, 1924; Verykios, 1934; Johnson, 1950; Kolb, 2016)<sup>46</sup>. The absence of good faith can result in the protest of a State subjected to the exercise of *de facto* sovereign powers over its own territory by another State. The element of good faith is not taken into consideration by the international judge in the application of the acquisitive prescription. Good faith exercises *de facto* powers as a main element in international jurisprudence which is discussed and ascertained. It is not necessary in order to apply the institution of acquisitive prescription. The presence of good faith is relevant to the enforcement of the acquisitive statute of limitations, since it can affect the amount of time sufficient to consolidate the validity of a historic title and the obligations relating to compensation for damages caused by the unlawful occupation of the territory of another State (Bailey, Daws, 1998; Di Stefano, Henry, 2012;

---

State refrained from formulating the objection which would have been reasonably expected from it, had it wished to signify its disapproval of the new practice (...)"

46According to Hall: "(...) it must be frankly recognized that internationally (acquisitive prescription) is allowed for the sake of interests which have (...) been looked upon as supreme, to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment, but to establish itself permanently and solidly (...)"

Hovell, 2016)<sup>47</sup>. Good faith plays an important role in the attribution of sovereign rights over a territory where the judge is called to resolve the dispute *ex aequo et bono* (Kolb, 2017), as we have seen in the Honduras Borders case where the arbitral tribunal affirms that:

“(...) the exercise in good faith of *de facto* sovereign powers over a disputed territory corresponded, according to fairness and justice, to a sort of pre-emption (priority) in the assignment of sovereign rights over the same (...)”<sup>48</sup>.

## **Parte B: Treaty formation and acquiescence**

The stages for the conclusion of a treaty are various and the silence of the participating States or not plays a marginal role in each of them. The first moment that abstention is noticed is when a State does not take a position during the drafting of the treaty (Aust, 2007; Hakapää, 2013). The moment of adoption is

---

<sup>47</sup>Legal consequences for the states of the continued presence of South Africa in Namibia (South-West Africa) despite resolution 276 (1970) of the Security Council, consultative opinion of 27 June 1971, in ICJ Reports, 1971, par. 16 and in particular the separate opinion of F. De Castro, p. 218: “(...) the presence of South Africa is somewhat in the nature of usurpation and an occupation *mala fide* (...). The Government of South Africa, as a possessor in bad faith, is responsible to the people of Namibia for the restitution of property, assets and the fruits thereof (...)”.

<sup>48</sup>ICJ, Land, island and maritime frontier (El Salvador v. Honduras), application to intervene, op. cit., p. 1539: “(...) In view of the nature of the territory, long uninhabited and unknown, and of the lack of authoritative delimitation, it was natural that there should have been conflicting conceptions of the extent of jurisdiction and that each Party should believe that it was entitled to advance into the unoccupied zone as its interests seemed to require. Such advances in good faith, followed by occupation and development, unquestionably created equities which enterprises subsequently under- taken would be bound to consider. When it appears that the two Parties, seeking to extend their area of possession, have come into conflict, the question of priority of occupation necessarily arises. Priority in settlement in good faith would appropriately establish priority of right (...)”.

the phase that produces legal effects since in this way the form and content of the treaties is crystallized (Kamto, 2011).

According to art. 9 (1) and 9 (2) CVTL (Hollis, 2020) and with an affirmative vote of two-thirds of States present and voting a State may abstain and is not included in the vote count. In this phase a State expresses itself with an express manifestation of consensus and with a decision-making procedure by consensus. This allows the adoption of an act without following what would be a mandatory procedure and a State can oppose it (Wolfrum, Pichon, 2010). In practice art. 9 CVTL is the adoption of a text with a unanimous vote, i.e. the widespread practice (Aust, 2007; Kamto, 2011).

The years and the needs of the international community change, the conferences have become many and there is a risk that the majority of two thirds of appearing scarcely representative of a general consensus or of excluding minorities of States of certain political persuasion which will surely have the aim of blocking articles not interested for their own purposes (Aust, 2007). Adoption by consensus ascertains the existence of an editorial agreement although the silence of the States cannot be interpreted with a favorable vote and give rise to a unanimous adoption (Aust, 2007; Kamto, 2011; Combacau, Sur, 2019). So art. 9(2) CVTL (Hollis, 2020) is not a customary rule (Kamto, 2011). The practice of adopting a treaty by consensus seems so

established that it has fallen into desuetude according to art. 9 (2) CVTL (Hollis, 2020)<sup>49</sup>.

Let us not forget that art. 11 CVTL (Buga, 2018; Dörr, Schmalenbach, 2018) allows freedom of form and States can express their consent and be bound by a preferable treaty and by any other agreed means (Szurek, 2011). The non-formality in the stage of manifesting consent through a conclusive behavior means that the State expresses the will to bind itself to a treaty directly (Kolb, 2017). A silence in this phase cannot express the intention of a State to bind itself to the observance of a treaty. In particular, art. 11 CVTL (Dörr, Schmalenbach, 2018) assumes that the State expresses consent through active conduct and tacit consent refers not so much to acquiescence but to those means of expression of consent that do not coincide with a written act or an oral declaration.

### **Reservations and acquiescence**

The unilateral declaration as a form of reservation and the production of its effects must be accepted by at least one of the other parties participating in the conclusion of a treaty (Giegerich, 2010). The treaty applies with reservation between the party that has made the reservation and the parties that have

---

<sup>49</sup>“(…) consensus (...) is used in treaties as a technique for the (...) adoption of provisions of a treaty of which the final text shall be adopted based on the rule of the qualified or unqualified majority as the case may be (...)”, p. 172.

accepted the same according to art. 20 (4) (a) (Corten, Klein, 2011) and also applies in the original wording between the parties who have not entered reservations (art. 21 (2)) (Buga, 2018; Dörr, Schmalenbach, 2018; Hollis, 2020). The need of the parties which rejected the reservation is not opposed to the entry into force of the treaty (art. 21 (3) (Corten, Klein, 2011) and the treaty will not produce any effect between the parties it has made and these which have accepted the same under article 20(4)(b) (Hollis, 2020).

The importance of accepting the reservation adopted by unanimity<sup>50</sup> or by qualified majority<sup>51</sup> is compatible with the object and purpose of the treaty (art. 19 (c) CVTL) (Hollis, 2020) and can be expressed or tacit (Aust, 2007; Villiger, 2009). The tacit acceptance always foreseeable by many States has been a topic of discussion in the works of ILC on the law of treaties (Müller, 2011)<sup>52</sup>. In particular, Gerald Fitzmaurice suggested:

“(...) that the possibility of tacitly accepting a reservation should depend on the number of parties to the treaty: only in multilateral treaties, distinct from those with limited participation, could the acceptance of a reservation be

---

50J. Brierly, First Report on the law of treaties (UN Doc. A/CN.4/23), 1950 (First Report), par. 93 ss.

51H. Lauterpacht, First Report on the law of treaties (UN Doc. A/CN.4/63), 1953 (First Report), pp. 133-134.

52The ICJ affirms that: “(...) extensive participation (...) has already given rise to greater flexibility in the international practice concerning multilateral conventions [also via] very great allowance made for tacit assent to reservations (...)”, Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports, 1951, p. 51, p. 21.

deduced sub silentio if, within three months, the other parties have not raised objections to the admissibility of the same (...)” (Müller, 2011)<sup>53</sup>.

Humphrey Waldock also shares the same line of thought, where he eliminated:

“(...) the distinction between treaties in relation to the admissibility of the tacit acceptance of a reservation<sup>54</sup> (...) on the formulation, opposition and acceptance of reservations were summarized in a single article (art. 20 CVTL) (Hollis, 2020), raising the deadline for raising an objection against the affixing of a reservation from three to twelve months<sup>55</sup>. Art. 20(5) CVTL (Dörr, Schmalenbach, 2018; Hollis, 2020) now provides that, if a party does not object to the admissibility of a reservation within twelve months of receiving notice of the same, it is presumed that it has accepted the applicability of the reservation (...)” (Dörr, Schmalenbach, 2018).

The provision of a peremptory term in which the States parties must oppose the opposition of a reservation (art. 20(5) CVTL) is twelve months. The Special Rapporteur Waldock notes in particular that:

“(...) the deadline for rejecting a reservation varied from a minimum of ninety days to a maximum of six months<sup>56</sup>. The choice of this deadline is not accidental. (...) A period of a longer time would have been welcomed more favorably (Horn, 1988)<sup>57</sup>. The provision of a term that is not reflected in the practice of the States prevents the rule from being qualified as acknowledging a custom. The term of twelve months of referred to in art. 20(5) (Hollis, 2020) can only be pleaded if the State which has maintained

---

53G. Fitzmaurice, First Report on the law of treaties (UN Doc. A/CN.4/101), 1956, p. 115.

54H. Waldock, Fourth Report in the law of treaties (UN Doc. A/CN.4/177), 1965, pp. 53-54.

55A. Pellet, Twelfth Report on reservations to treaties (UN Doc. A/CN.4/584), 2007, parr. 19, 33.

56H. Waldock, First Report on the law of treaties (UN Doc. A/CN.4/144), 1962, p. 57 and A. Pellet, Twelfth Report, op. cit., par. 33.

57“(...) A shorter period may well be appropriate in treaty provisions when the parties have expressed their readiness to accept it. But in a general provision it may be necessary to allow a longer period, in order that the provision may meet with the assent of the great majority of States. It is for this reason that a twelve months period is the period inserted in the draft (...)”.

silence is a party to the CVTL (...)” (Aust, 2007; Müller, 2011)<sup>58</sup>.

The expiry of the twelve-month time limit without objection is considered on an equal footing with the acceptance of the reservation (Villiger, 2009)<sup>59</sup>. In particular, art. 20 (5) refers to acquiescence as an express acceptance according to art. 20 (4) (a) and without posing the need to ascertain the subjective status of the same (Hollis, 2020). In such event the party will be obligated to voluntarily and independently comply with the reservation as a setting of the presumption that is absolute and that a party has not objected to the formulation of a reservation and must be acceptable. According to art. 45 (2) (Hollis, 2020) the change of the legal relationship will have to be reconstructed according to the circumstances of the case. A party has no intention of accepting the affixing of a reservation for any reason and refrains from explicitly expressing its opposition for twelve months. The twelve-month step translates into an objective element where the existence of a subjective element derives (Müller, 2011)<sup>60</sup>. The silence produces effects as a legal act and not as a legal fact because the twelve months start from the moment in which the reservation is communicated. The

---

58A. Pellet, Twelfth Report, op. cit., par. 34.

59A. Pellet, Twelfth Report, op. cit., par. 37(b).

60 “[A]rticle 20, paragraph 5 (...) on the one hand, (...) establishes the principle of tacit assent and the relationship between acceptance and objection and, on the other, (...) provides a time frame for the presumption of tacit acceptance. If a State does not object within a period of 12 months, it is presumed to have accepted the reservation (...)”, A. Pellet, Twelfth Report, op. cit., par. 36: “(...) this doctrinal distinction is of little interest (...) this is an issue of a time period (...)”.

abstention of a party to affix a reservation is aware of the consequences of passive conduct which retains an intentional connotation. It is argued that the introduction of a fixed term after the expiry of the reserve produces the relative effects and thus makes the assessment superfluous, fictitious *rectius* of the subjective state of the parties to the conclusion treaty.

### **Interpretation of treaties and acquiescence**

Article 31(2) (Dörr, Schmalenbach, 2018) with regard to the interpretation of treaties defines as “internal context” the preamble, the annexes and any other agreement or instrument having to do with the conclusion of the treaty and is recognized by the parties as binding (Dörr, 2018). Art. 31(3) defines as “external context” any subsequent agreement or instrument (subsequent agreement) having to do with the conclusion of the treaty and relating to the application or interpretation of the same (art. 31(3)(a)) (Dörr, Schmalenbach, 2018). This practice established between the parties (subsequent practice) and reconstructs the existence of a subsequent agreement or instrument (art. 31(3)(b)) and any rule of international law that may be applied between the parties (art. 31(3)(c)) (Sorel, 2011; Dörr, Schmalenbach, 2018; Hollis, 2020).

Art. 31 (2) which has to do with the circumstances of the conclusion of the treaty (Villiger, 2009), from a theoretical and

practical point of view (Sorel, 2011; Liakopoulos, 2020b)<sup>61</sup>, assumes an interpretative criterion of the external context and introduces a distinction between the subsequent agreement which is not binding but takes the form of a document which collects the will of the parties by interpreting the treaty in a specific way<sup>62</sup>.

Effects also arise due to the inertia of the States when the interpretative criterion of an external nature involves the development of an application or provisions of a treaty (subsequent practice) (Buga, 2018; Peat 2019). The practice translates into a subsequent agreement regarding the interpretation of a treaty and in the absence of a common act since the parties have not participated in the development of the practice and recognize its validity<sup>63</sup>.

---

61G. Nolte, First Report on subsequent agreements and subsequent practice in relation to treaty interpretation (UN Doc. A/CN.4/660), 2013 [First Report]; G. Nolte, Second Report on subsequent agreements and subsequent practice in relation to treaty interpretation (UN Doc. A/CN.4/671), 2014 [Second Report]; G. Nolte, Third Report on subsequent agreements and subsequent practice in relation to treaty interpretation (UN Doc. A/CN.4/683), 2015; G. Nolte, Fourth Report on subsequent agreements and subsequent practice in relation to treaty interpretation (UN Doc. A/CN.4/694), 2016. see also: H. Waldock, Third Report on the law of treaties (UN Doc. A/CN.4/167), 1964, par. 23 ss.

62G. Nolte, Second Report, op. cit., par. 58.

63G. Nolte, Second Report, op. cit., par. 30. the Appeal Body of WTO affirms that: "(...) in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (...) but does not react to it (...)", Appellate Body report, European Communities-Customs Classification of Frozen Boneless Chicken Cuts (EC-Chicken Classification), WT/DS269/AB/R of 27 September 2005, par. 292-294.

This position is also confirmed in the works of the ILC where it is underlined that the draft of art. 31 (3) (b) excludes the reference “to all the parties” feeling the idea that the development of a subsequent practice presupposes the contribution of each single party of the treaty (Liakopoulos, 2020c)<sup>64</sup>. Express or tacit acknowledgment must meet certain requirements. The main one is that the parties are aware of the existence of the following practice. This is an implicit requirement where the concept of recognition is correlated with the function of the practice it follows and offers an authentic interpretation of the treaty. In this case only the conscious party that allows the conclusion of the agreement (art. 31 (3) (a)) (Abi-Saab, Keith, Marleau, Marquet, 2019) accepts the practice and the validity of the treaty (Bos, 1980)<sup>65</sup>.

In this case, the international judge imposes a stringent burden of proof which intends to demonstrate the formation of a subsequent agreement by invoking the acquiescence of the counter-party in the face of an application practice of the treaty

---

64“(…) the text provisionally adopted in 1964 spoke of a practice which “establishes the understanding of all the parties”. By omitting the word “all” the Commission did not intend to change the rule. It considered that the phrase “the understanding of the parties” necessarily means “the parties as a whole”. It omitted the word “all” merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice (...)”, Yearbook of the International Law Commission, II (UN Doc. A/CN.4/SER.A), 1966 [Yearbook II, 1966], p. 222. See also: G. Nolte, Second Report, op. cit., par. 60.

65G. Nolte, Second Report, op. cit., parr. 55, 67.

(Boisson de Chazournes, 2013)<sup>66</sup>. In this spirit we recall the ILC Kasikili/Sedudu case<sup>67</sup>, where:

“(...) the assessment was based on the correct interpretation of a treaty dating back to 1890 signed by the then colonial powers, respectively the United Kingdom and Germany (...). The Commission awarded the island to Botswana and notified both countries of the result. South Africa (then the colonial power in Namibia) did not respond to the notification, nor to Botswana's attempt to initiate diplomatic contacts to implement the 1890 treaty in the light of the Commission's interpretation (...). South Africa denied having recognized the validity of the Commission's actions. Namibia argued that South Africa's conduct could not demonstrate a consensus regarding Botswana's practice of claiming the island as its own following the Technical Commission's assessment (...). It confirmed this position, denying that it could be inferred from the circumstances of the case that the South Africa deems Botswana's practice legitimate and, consequently, that the 1890 treaty should be interpreted in the sense of assigning to the latter the sovereignty of the island on the Chobe River (...)”<sup>68</sup>.

In the ICJ Pulau Ligitan/Pulau Sipadan case it is noted that:

“(...) the request was based on the correct interpretation of an article contained in a treaty dating back to 1891 signed by the then colonial Powers, respectively the Netherlands and the United Kingdom (...)”<sup>69</sup>.

The treaty should be interpreted in the light of the later practice developed by the Netherlands. This practice was summarized in the adoption of some acts of domestic law, including a map that included the disputed islands within Dutch possessions. At the time, the Netherlands notified the UK of the map and received no response. An “interaction” would have been sufficient to

66“(...) [T]he ascertainment of subsequent practice under article 31 (3) (b) may be more demanding than what the formation of customary law requires (...)”, p. 27, note 128.

67ICJ, Kasikili Sedudu Island (Botswana v. Namibia) judgment of 13 December 1999, op. cit., par. 2.

68ICJ, Kasikili Sedudu Island (Botswana v. Namibia) judgment of 13 December 1999, op. cit., par. 2.

69ICJ, Pulau Ligitan and Sipadan case (Indonesia v. Malaysia), op. cit., par. 36-37.

demonstrate the existence of a practice subsequent to the conclusion of the 1891 treaty and from which it could be deduced that the latter assigned the disputed islands to Indonesia, noting that the United Kingdom's silence was not sufficient to express acquiescence<sup>70</sup>.

In Beagle Channel case, the ICJ affirms that:

“(…) Argentina and Chile claimed sovereignty over certain areas of the Beagle Channel, a strait which, in its eastern portion, is crossed by the border between the two countries (...). Chile based its request on a treaty dating back to 1881 and, in particular, on the practice following it. Indeed, it was known that Chile had exercised its jurisdiction over the disputed areas for many years<sup>71</sup> (...). Argentina replied that, in the absence of an express agreement, art. 31(3)(b) could not be applied and, therefore, his silence before the practice of Chile was irrelevant (...). The position of Chile, highlighting that the silence of a State can undoubtedly be equivalent to the tacit recognition of the validity of a subsequent practice, has influenced the correct interpretation of a treaty (...)” (Helgeson, Lauterpacht, 2000; Drahozal, Gibson, 2007; Gordon, 2009; Sorel, 2011; Giorgetti, 2012; Alland, 2021)<sup>72</sup>.

---

70 “(...) in these circumstances, such a lack of reaction to this line on the map (...) cannot be deemed to constitute acquiescence (...) It follows from the foregoing that the map cannot be considered either an “agreement relating to [a] treaty which was made between all the parties in connection with the conclusion of the treaty (...)”, within the meaning of article 31, paragraph 2(a), of the Vienna Convention, or an “instrument which was made by [a] part[y] in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty”, within the meaning of article 31, paragraph 2(b), of the Vienna Convention (...)”, par. 48. See also Appellate Body report, European Communities-Customs Classification of Frozen Boneless Chicken Cuts (EC-Chicken Classification), WT/DS269/AB/R, op. cit., par. 34.

71 Dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, UNRIIAA, Vol. XXI, p. 53, par. 168.

72 “(...) In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty (...) The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves (...)”. Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary

Art. 31 (3) (b) establishes, as we have also seen from jurisprudential practice, a risk of confusion with different phenomena such as that of acquisitive prescription and the formation of a customary rule which integrates the provisions of a treaty. The legal effects which are the results of silence to a party to a treaty are limited to those of art. 31 (3) (b) (Dörr, Schmalenbach, 2018)<sup>73</sup>. We recall the Temple of Preah Vihear case where the ICJ considered both the acquisitive prescription and the estoppel by silence<sup>74</sup>, given that:

“(...) the exercise of sovereign powers put in place by France in the disputed area are elements that could amount to a subsequent practice, developed in application of the Franco-Siamese Treaty of 1904 and which Thailand recognized as legitimate through its prolonged silence (...) lean towards a similar approach in a passage of the decision (...)”<sup>75</sup>.

Back in 1924, Arnold McNair noted: “(...) that international jurisdiction must recognize, to a certain extent, the principle that a State cannot be “one cold and one hot”, meaning that it cannot change constantly at the expense of the rest of the States (...)” (McNair, 1924). Derek Bowett underlined:

---

Objections, Judgment, ICJ Reports 1996, p. 803, par. 30; Behring international, Inc v. Islamic Iranian Air force and others, case n. 382, award of 21 June 1985, Iran-US, CTR 1985-I, p. 238ss.

73G. Nolte, Second Report, op. cit., par. 60.

74G. Nolte, Second Report, op. cit., parr. 61-62.

75“(...) It has been contended on behalf of Thailand that th[e] communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand (...) [I]t is clear (however) that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced (...)”, p. 23.

“(…) how for the institution of estoppel to function as a binding obstacle (Kaijun, 2017), some important conditions must be fulfilled: First, the meaning of the declaration-position of the first State to be plain and clear. Secondly, the declaration-position should be of a voluntary nature, i.e. the second State should not be forced to accept it; it should be made without conditions; and, finally, the person expressing it should have the necessary authorization (…).” (Bowett, 1957).

Finally, the effects of a subsequent practice in the light of the interpretation of a treaty coincide with those of other phenomena such as those of the acquisitive prescription of sovereign rights governed by the formation of customs that modify the application of the State. The legal value of silence depends on how the judge decides to qualify the intentional and voluntary silence of one or more parties to the treaty.

### **Modification of treaties and acquiescence**

The reopening of negotiations to amend a treaty calls into question the validity of a single provision (König, 2013; Kolb, 2016). A unilateral and controversial position by a State can fall into desuetude and be replaced with a different rule by a subsequent agreement between the parties (Wouters, Verhoeven, 2008a). This is a position questioned by the ILC<sup>76</sup>. The wording of art. 38 takes into consideration art. 31 (3) (b) where the subsequent practice constitutes objective criteria for the interpretation of the same content by stating that the parties have

---

<sup>76</sup>Yearbook II, 1966, p. 236.

tacitly replaced a provision with a new similar one (Sorel, 2011)<sup>77</sup>. What's the difference? According to art. 31 (3) (b) the subsequent practice is a useful tool for interpreting a provision while according to art. 38 involves a modification of the treaty (Di Stefano, 1994) given that art. 38 does not enter the internal ambit of CVTL but inserted due to the lack of relevance to the law of treaties (Kolb, 2016). In reality, this mechanism falls within the scope of art. 39 which establishes that a treaty is modified with an agreement concluded between the parties (Sands, 2011).

In presence of South Africa in Namibia the ICJ affirms: “(...) the validity of this derogation from art. 27(3) (...)”<sup>78</sup>. The subject of the advisory opinion was South Africa's refusal to implement Security Council Resolution 284(1970). Its own refusal was based, *inter alia*, on the fact that Resolution 284(1970) was invalid because it had been adopted with the abstention of the Soviet Union and the United Kingdom. It observed that the Security Council had developed the practice of adopting a resolution in the event of the constant abstention of one of the

---

<sup>77</sup>“(...) this subsequent practice (on interpretation of treaties) reflects what the parties intended. This is therefore a matter of reintroducing the intention of the parties to allow the definition of an objective that remains vague in text, but only if practice is concordant and common to all parties. Pushed to the extreme, this approach could lead to modifications of the treaty (...)”.

<sup>78</sup>ICJ, Legal consequences for states of the continued presence of South-Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), op. cit., par. 21.

permanent members and that this practice was valid insofar as it was recognized as legitimate by the UN Members (Kolb, 2016)<sup>79</sup>.

The silence of the parties produces its effects as a manifestation of the existence of an agreement between them with the aim of modifying or integrating the content of the treaty. Such agreement may result from positive conduct, reciprocal or concurrent, but it is not necessary for all parties to have actively participated in the development of the subsequent practice for the treaty to undergo a change. The agreement is perfected due to the absence of protests in the face of a different application of the treaty.

Certainly the interest in taking action has to do with the right/duty to report a non-compliance in the application of the treaty (Kolb, 2016). The inertia of prolongation for a period of time is significant and manifests itself through the consensus that introduces a change in practice. Silence as a tacit behavior of the legitimacy and desirability of an amendment to a treaty and the acquiescence of the parties express an *opinio juris* which crystallizes a customary rule<sup>80</sup>. Changing a subsequent practice

---

<sup>79</sup>According to R. Kolb: “(...) in the Namibia advisory opinion of 1971 the ICJ held that (...) the clear text of article 27, § 3, of the Charter (...) had been modified by the subsequent practice within the Council. No objection against the new practice had been raised in the UN membership. It had thus been accepted by acquiescence (...)”, pag. 75.

<sup>80</sup>“(...) The issue is plainly not one limited to a legal act (a tacit agreement); it is rather one about a customary process (...) upon the treaty (subsequent practice). The

of silence of the parties is not confused with a treaty change made in accordance with the opting-out procedure (Quane, 2014)

### **Invalidity of treaties and acquiescence**

The formation of a treaty also allows the causes of invalidity, i.e. suspension or termination of a treaty (Marie, 2018) which thus releases the parties from contractual obligations by asserting the cause of invalidity of the treaty (Villiger, 2009). It is a behavior that betrays the legitimate expectations of the parties by creating unjust damages and paves the way for a State to act in bad faith. So art. 45 CVTL (Corten, Klein, 2011; Hollis, 2020) aims to prevent such a situation from occurring<sup>81</sup>.

In particular, art. 45(a) states that a State explicitly waives the right to invoke the invalidity of a treaty. In this case the State will have to stick to declaring that it will not be able to change an idea, stating that it is not bound to respect the treaty because it is invalid (Villiger, 2009). The distinction between express (art. 45 (a)) and tacit (art. 45 (b)) waiver seems consistent with the relationship between unilateral acts and acquiescence. The waiver as a unilateral act (waiver) takes into consideration art.

---

*opinio juris* in this case flows automatically from the fact that the implementation of a treaty is a stake (...). In other words, we are here confronting a special type of customary law, which is limited to the treaty parties and where the legal opinion is implicit (...)", pag. 77.

<sup>81</sup>Yearbook II, 1966, p. 239.

45 (a) only when the express waiver and acquiescence is associated with art. 45 (b) and as a conclusive conduct (Dörr, Schmalenbach, 2018). Renunciation as a unilateral act does not manifest the form of a silence.

In reality art. 45(b) is the only one of the CVTL that explicitly refers to acquiescence and the adoption of this conduct is met with resistance among signatory States (Kohen, 2011; Marie, 2018). The biggest problem is the role played by acquiescence and the possibility of losing a right of primary importance. The States highlight the difficulty that the renunciation of the invalidity of a treaty from a conduct has and when the latter translates into abstention or silence. Art. 45 (b) actually coincides with a rule of customary law (Kolb, 2016). And we have the evidence for this statement from the jurisprudence since the ICJ interprets art. 45(b) as a recognition article of a custom.

In practice we recall the *Nicaragua v. Colombia* (2007) case:

“(...) Nicaragua invoked the invalidity of the 1928 Treaty of Managua (...) which established the maritime borders between Nicaragua and Colombia in the San Andrés Archipelago (...). Nicaragua argued that the 1928 Treaty was invalid because it was concluded in violation of the Constitution and, moreover, by a foreign power, since, at that time, the country was under military occupation by the United States (Butcher, 2013)<sup>82</sup>. Colombia observed on the contrary that, for almost fifty years, Nicaragua had refrained from raising that question and that, therefore, regardless of the merits of the dispute, it had lost the right to invoke the invalidity of the 1928 Treaty (...).

---

<sup>82</sup>ICJ, Territorial and Maritime Dispute (*Nicaragua v. Colombia*), Preliminary Objections, Judgment, ICJ Reports 2007, p. 832, par. 75.

CIJ welcomed Colombia's position and, although Nicaragua is not part of the CVTL, reiterated that, after a long time and various official occasions to represent the problem, the validity of the 1928 Treaty could no longer be questioned (...)” (Magnússon, 2015; Mossop, 2016; Chan, 2018)<sup>83</sup>.

According to our opinion art. 45(b) is contentious with procedural and material nature due to the tacit waiver of the right to invoke the invalidity of a treaty. The acquiescence unfolds its effects and affects the existence of a right and not the ability to enforce that right in court. Acquiescence also produces procedural effects (Kohen, 2011) due to estoppel (Kolb, 2016)<sup>84</sup>. Precisely, art. 45(b) precludes a State from invoking the invalidity of a treaty, but without consequences/effects on the cause of invalidity which vitiates the conclusion of the same

---

83“(...) the Court thus notes that, for more than 50 years, Nicaragua has treated the 1928 Treaty as valid and never contended that it was not bound by the Treaty, even after the withdrawal of the last United States troops at the beginning of 1933. At no time in those 50 years (...) did Nicaragua contend that the Treaty was invalid for whatever reason, including that it had been concluded in violation of its Constitution or under foreign coercion. (...) The Court thus finds that Nicaragua cannot today be heard to assert that the 1928 Treaty was not in force in 1948 (...)”, parr. 79-80. And according to the Declaration of B. Simma in pag. 859: “(...) [t]he principle underlying Article 45 (b) of the Vienna Convention is undoubtedly applicable under the present circumstances: by its past behavior, Nicaragua can no longer rely on the invalidity of the 1928 Treaty (...)”; and the dissenting opinion of R. Abraham, par. 45: “(...) the Vienna Convention (...) assuredly must be seen as expressing the customary law of treaties as it now stands on this point (...)”. ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, p. 3, par. 49: “(...) the Court observes that under customary international law, reflected in article 45 of the Vienna Convention, a State may not invoke a ground for invalidating a treaty on the basis of, inter alia, provisions of its internal law regarding competence to conclude treaties if, after having become aware of the facts, it must by reason of its conduct be considered as having acquiesced in the validity of that treaty (...)”. See the Court’s judgment in *Nicaragua v. Colombia*: “(...) relates only to the delineation of the outer limits of the continental shelf, and not delimitation” (Judgment on Preliminary Objections, 17 March 2016 para 110).

84Yearbook II, 1966, p. 239.

(Dörr, Schmalenbach, 2018).

Within this circle we recall the *Nicaragua v. Colombia* (2007) case, where the ICJ:

“(...) has decided to address Nicaragua's request regarding the invalidity of the 1928 Treaty during the preliminary objections precisely because the loss of the right to invoke the invalidity of a treaty is a procedural issue (Kohen, 2011). The interpretation of art. 45(b) is however not tenable, for several reasons (...). The rule has been placed in Section 1 of Part V of the CVTL, i.e. among the general provisions on the subject of nullity, extinction and suspension of the application of treaties (...). The waiver pursuant to art. 45(b) produced procedural effects. It would have made more sense to include it in Section 4 which deals with the procedure to be followed for invoking such nullity, termination or suspension. The application of art. 45(b) produces material effects and finds support in the work of the ICL on the law of treaties (Cohen, 2011). Humphrey Waldock also affirms in this regard: “(...) that the rule should not be reduced to the concept of foreclosure, but to that of a tacit agreement (...)”<sup>85</sup>. Qualifying the effects of the waiver as only procedural clashes with the very function of art. 45(b), i.e. with the need to ensure that a treaty remains valid if the party who had the opportunity to invoke a cause of invalidity chose to remain silent and execute the same without notifying the other parties. In this sense, there is no doubt that acquiescence produces material effects, by healing an otherwise invalid treaty (...)”<sup>86</sup>.

The concrete methods of ascertaining the waiver expressed through passive conduct and the existence of a cause of invalidity is a main requirement for the application of art. 45, as an express or tacit waiver. The effective knowledge of the existence of a cause of disability indirectly reconstructs the analysis of circumstances (Kolb, 2016). The invalidity of a

---

<sup>85</sup>H. Waldock, Fifth Report on the law of treaties (UN Doc. A/CN.4/183), 1966, p. 7.

<sup>86</sup>“(...) the fundamental trait of (...) article [45(b)] is its affirmation of the validity of the treaty, or of its maintenance in force or in operation despite the existence of a ground for invalidity (...) the rule set out can thus also be called a rule of substance (...)”.

treaty according to art. 45 (b) infers an unequivocal and constant inertia as well as prolonged *in tempis* (Kohen, 2011). The ILC does not subordinate the effects of the waiver to the expiry of a term and silence as knowledge of the existence of a cause of invalidity may continue for a reasonable period of time<sup>87</sup>. When a State invokes the cause of invalidity it acts immediately and without unjustified delay (Kohen, 2011, Kolb, 2016). This conduct does not produce effects in itself but remains as an expression of the will of a party to refrain from denunciation and the existence of a cause of invalidity of the treaty (Kohen, 2011)<sup>88</sup>.

### **Termination of treaties and acquiescence**

The termination of treaties enters the circle of art. 54 ((a) and (b)) CVTL as a basis for the consensus of all parties and as an expression of the fundamental principle *pacta sunt servanda* (Dörr, Schmalenbach, 2018). Art. 54(a) affirms this principle and the modalities of termination or withdrawal of a treaty (Chapaux, 2011), as the only way of liberation from it.

---

<sup>87</sup>H. Waldock, Fifth Report, op. cit., p. 7.

<sup>88</sup>“(…) the formulation used [in article 45 (b)] could lead one to believe that independently of the existence or not of a genuine acquiescence, the State “must be considered as having acquiesced” (...) in this part of the provision the stress is laid on the “conduct” or behaviour of the State. It is therefore ultimately an examination of this conduct or behaviour which enables one to establish whether the State has, or has not, acquiesced (...)”.

A treaty can be terminated at any time and in any way but requires the consent of all parties (Villiger, 2009; Chapaux, 2011). The ILC spoke of the theory of *acte contraire* which requires the parties to a treaty to extinguish it exclusively and through a contrary act, i.e. an act concluded in the same form and with the opposite content<sup>89</sup>. The same art. 54(b) confirms the term consent and non-agreement to describe the means of terminating or denouncing a treaty (Chapaux, 2011; Marie, 2018)<sup>90</sup> by express or tacit consent. In the case of missing unilateral denunciation and without a valid reason, the other party refrains from raising objections for a certain period of time. The latter can show acquiescence and the treaty is subsequently terminated (Villiger, 2009; Chapaux, 2011)<sup>91</sup>.

Art. 54 (b) allows the termination of a treaty by mutual consent and after consultation of the contracting parties, i.e. the States that have signed a treaty that entered it into force (Chapaux, 2011). This procedural obligation protects future rights and parties that have an obvious interest in seeing the treaty terminate. It is not clear whether consultation between the

---

<sup>89</sup>H. Waldock, Second Report on the law of the treaties (UN Doc. A/CN.4/156), 1963, p. 71: "(...) it is sometimes said that the subsequent agreement must be cast in the same form as the treaty which is to be terminated, or at least be a treaty form of 'equal weight'. This view [however,] reflects the constitutional practice of individual States, not a general rule of treaty law (...)", p. 249.

<sup>90</sup>G. Fitzmaurice, Second Report on the law of treaties (UN Doc. A/CN.4/107), 1957, p. 28.

<sup>91</sup>H. Waldock, Second Report, op. cit., p. 71.

parties has an effective function (Plender, 1987). It is a consultation that functions as a right, but without participation in reaching an agreement on the termination of the treaty (Villiger, 2009)<sup>92</sup>. Consultation is irrelevant given that the obligation to consult is not customary (Plender, 1987; Chapeaux, 2011). But the obligation to consult is reconciled with the termination of a treaty through acquiescence (Chapeaux, 2011) given that the parties do not react to the proposal to terminate or denounce a treaty and it is not clear whether the obligation to consult presupposes passive behavior for one's own satisfaction<sup>93</sup>:

“(...) it is difficult to imagine how State parties could demand the opinion of the other contracting State as part of a tacit consent, which is based, by definition, on what is left unsaid (...)” (Chapeaux, 2011).

Extinction can also occur through *desuetudine* (Wouters, Verhoven, 2008b) as a situation in which all parties shirk their contractual obligations and thus express their willingness to extinguish from a treaty, as today's practice seems however very scarce (Marie, 2018).

We recall the Nuclear Tests case in Aegean Sea, where the ICJ affirms that:

“(...) the issuance of precautionary measures pursuant to art. 41 of the Statute or, alternatively, of art. 33 of the 1928 Geneva Convention on the peaceful settlement of disputes (Treves, 1999-2000; Freestone, Barnes, Ong, 2006;

---

92“(...) consultation (...) implies the right for the contracting States to be heard, though not to participate in the decision”.

93“(...) accordingly, a practice in favour of consulting the other contracting States, as part of a termination or withdrawal process based on tacit consent, is not only non-existent but also impossible (...)”, p. 1241.

Miles, 2017; Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019)<sup>94</sup> (...) could not be applied, because it fell into desuetude (...)”<sup>95</sup>.

The ICJ did not pronounce itself on the point, limiting itself to pointing out, in the first case, the applicability of art. 41 of the Statute and, in the second, the absence of one's own jurisdiction (Mofidi, 1998)<sup>96</sup>.

Gerald Fitzmaurice had also proposed:

“(...) to insert desuetude, as a tacit agreement whose existence can be reconstructed on the basis of the conduct of the parties, i.e. as an autonomous cause for the termination of a treaty (...)”. (Fitzmaurice, 1953)

However, he decided to eliminate any reference to *desuetudine*, considering the institution included in the formulation of what would become art. 54(b)<sup>97</sup> given that art. 42(2) establishes that the only causes for termination of a treaty are those regulated in the CVTL. Desuetude can only be invoked in the context of art.

---

<sup>94</sup>ICJ, Nuclear Tests (Australia v. France), Judgment, ICJ Reports 1974, p. 253, par. 22; Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978, p. 3, par. 38.

<sup>95</sup>ICJ, Nuclear Tests (Australia v. France), op. cit. and Aegean Sea Continental Shelf, Judgment, op. cit.

<sup>96</sup>In the case East Timor (East Timor (Portugal v. Australia), judgment, ICJ Reports 1995, p. 102, par. 29) the ICJ accepted the “irreproachable” *erga omnes* character of the right of peoples to self-determination, but held that: “(...) the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case (...) the Court cannot act, even if the right in question is a right *erga omnes* (...)”. see also the dissenting opinion of Weeramantry, pp. 190-191.

<sup>97</sup>“(...) while “obsolescence” or “desuetude” may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty. In the Commission’s view, therefore, cases of “obsolescence” or “desuetude” may be considered as covered by article 51, paragraph (b) under which a treaty may be terminated “at any time by consent of all the parties” (...)”, Yearbook II, 1966, p. 237.

54(b) (Dörr, Schmalenbach, 2018). The party will formulate its request in the sense of requesting the verification of the existence of a tacit agreement concluded between the parties in order to extinguish the treaty which has fallen into desuetude (Wouters, Verhoeven, 2008b). Moreover, it interprets the conclusive behavior of the parties as an expression of an *opinio juris* (Kolb, 2016). Desuetude is not the result of a tacit agreement but contrary to custom (Adoua-Mbongo, 2021). The extinction of the treaty does not depend on the conclusion of a tacit agreement but on the creation of a type, we can say, of a negative habit fueled by an *opinio non juris*. The lack of a type of objection protracted over time ends up as equivalent to the recognition of the arguments where the parties invoke the extinction of their contractual obligations. Silence produces acquiescence between the parties and implicitly it is agreed that the cause in question has terminated its treaty.

### **Part C: Different areas in which acquiescence unfolds its effects**

The silence of States, the prescriptive law and the sources on the production of the law are topics of discussion of the acquiescence and above all for the formation of a dispute and the loss of the right to invoke the responsibility of a State.

### **Acquiescence and international controversy**

The definition of dispute is much discussed both by doctrine and by international jurisprudence. In particular we notice in Mavrommatis case where the PCIJ described a dispute as: “(...) a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons (...) (Nègulesco, 1936; Waldock, 1948; Stillmunkes, 1964; Pratap, 1972; Soubeyrol, 1972; Yee, 1999; Mayr, Singer, 2016; Liakopoulos, 2020c)<sup>98</sup>. In interpretation of Peace Treaties we noticed that:

“(...) (first phase) a dispute materializes when the parties maintain clearly incompatible positions regarding the performance of an obligation (...)”<sup>99</sup>.

The circumstances and the criteria for distinguishing between a political or juridical dispute are topics that are difficult to state and often without conclusions (Schreuer, 2008).

What interests us is that even in the case of an international dispute the parties involved discuss each other within this

---

<sup>98</sup>The Mavrommatis Palestine Concessions, PCIJ, Collection of Judgments, Series A-No. 2, August 30th, 1924, p. 11.

<sup>99</sup>ICJ, Interpretation of peace treaties concluded with Bulgaria, Hungary and Romania, in ICJ Reports, March 30, 1950, par. 65, p. 74: “(...) there has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain (...) obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen (...)”. See also in argument: South West Africa, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319, p. 328; Northern Cameroons, Judgment, ICJ Reports 1963, p. 15, p. 27; Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6, par. 90.

action-reaction mechanism (Schreuer, 2008).

A dispute dates back even in the absence of an active opposition from one of the parties involved (Marie, 2018). In the Diplomatic and Consular Staff in Tehran case the ICJ affirms:

“(…) the existence of a dispute between the United States and Iran despite the fact that the latter had not proposed an alternative version of the facts to that presented by the United States and the proceeding was carried out *in absentia* (…)” (Bernhardt, 1980; Gross, 1980; Paul, 1980; Zoller, 1980; Lucht, 2011)<sup>100</sup>.

In Land and Maritime Boundary (1998) case, the ICJ affirms:

“(…) the existence of a dispute over the delimitation of the border with Cameroon, limiting itself to claiming its sovereignty over some specific areas, including Darak and Bakassi” (Venzke, 2011)<sup>101</sup>.

Cameroon argued that questioning the belonging of some areas on the border between two States was equivalent to opening a discussion on the delimitation of the border in its entirety even if Nigeria's request concerned a couple of well-located areas and was not aimed at contesting the entire border. The existence of a broader dispute could in principle also be deduced from the conduct of the parties, without the same necessarily having to be decided *expressis verbis*<sup>102</sup>.

---

<sup>100</sup>United States Diplomatic and Consular Staff in Teheran, Judgment, ICJ Reports 1980, p. 3, parr. 45-47. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, p. 12, par. 38.

<sup>101</sup>ICJ, Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, par. 84.

<sup>102</sup>“[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party”, par. 89.

In the International Convention on the Elimination of All Forms of Racial Discrimination, Russia stated that the notion of dispute, referred to in art. 22 of the International Convention on the elimination of all forms of racial discrimination of 1965, should be interpreted differently from that of a general international law dispute (Lucak, 2012)<sup>103</sup>. Georgia replied that there are no differences between the generally recognized notion and the one mentioned in the Convention, emphasizing that the confrontation from which a dispute arises can also take place very quickly and in the face of the inertia or silence of one of the parties. The ICJ confirmed Georgia's position, noting that the existence of a dispute can also be inferred from the lack of protests if it is reasonable to expect that the party involved will have to defend itself against the allegations<sup>104</sup>. Georgia, however, had not even tried to negotiate with Russia the cessation of violations of the Convention<sup>105</sup> and ICJ thus excluded its jurisdiction pursuant to art. 22.

In *Norstar* case<sup>106</sup>, the International Tribunal for the Law of the

---

<sup>103</sup>Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, par. 26.

<sup>104</sup>“(…) [T]he existence of a dispute may be inferred from the failure to respond to a claim in circumstances where a response is called for (…)”, par. 30.

<sup>105</sup>Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, op. cit., par. 27.

<sup>106</sup>ITLOS, The M/V “Norstar” Case (Panama v. Italy), ITLOS Case N° 25, Preliminary Objections, Judgment of 4th November of 2016, p. 4.

Sea (ITLOS) ordered the seizure of a vessel flying the Panamanian flag anchored in the port of Palma de Mallorca for suspected illegal activity in Italian territorial waters<sup>107</sup>. Panama was trying to get in touch with Italy to negotiate a settlement of the dispute. However, Italy often avoided responding to messages sent from Panama and reacted by objecting, *inter alia*, to the non-existence of a dispute, emphasizing that communications with Panama could not substantiate a dispute. Panama argued instead that, by refusing to answer, Italy had in fact expressed a position contrary to the illegitimacy of the seizure of the ship<sup>108</sup>, concluding that Italy could not rely on its silence to contest the existence of a dispute (Marie, 2018; Liakopoulos, 2021)<sup>109</sup>.

In Marshall Islands case the ICJ affirms that: “(...) a passive conduct can contribute to the formation of a dispute” (Bianchi,

---

107ITLOS, The M/V “Norstar” Case (Panama v. Italy), ITLOS Case N° 25, Preliminary Objections, op. cit., par. 42.

108Par. 76: “(...) Panama states that “Italy has not responded to any of the written communications sent by Panama” and argues that, “[b]y refusing to answer Panama’s communications, Italy has, in fact, implicitly taken a very different position from Panama by rejecting Panama’s formal requests, thereby confirming the existence of a serious disagreement.” Panama is of the view that “[t]he Tribunal should take into account the silence of Italy as unambiguous evidence of its refusal of Panama’s claim (...)”.

109Par. 101: “(...) Italy cannot rely on its silence to cast doubt on the existence of a dispute between the Parties. In the view of the Tribunal, the existence of such a dispute can be inferred from Italy’s failure to respond to the questions raised by Panama regarding the detention of the M/V “Norstar” (...)”. And according to Marie: “(...) le simple fait de s’abstenir de répondre équivaut toujours à un refus, quelle qu’ait été l’attitude sollicitée (...)”.

2017; Pigrau Solè, 2018; Liakopoulos, 2020c)<sup>110</sup>. However, it denied the existence of a dispute on the basis that the United Kingdom could not consider itself aware of the position of the Marshall Islands regarding the violation of its international obligations concerning nuclear disarmament. Thus it was confirmed that silence can constitute a significant element to evaluate the confrontation between the parties and reconstruct the existence of a dispute, but only as a legal act<sup>111</sup>. From the jurisprudence just cited we understand that only a conscious silence includes the voluntary character and as a consequence produces acquiescence.

Silence in a conflict focuses on its impact in the area of the law of the use of force. The involvement of silence is not a decisive factor in producing a substantive effect particularly capable of affecting the norms being formed. Christine Gray reprimands the proponents of the above approach because instead of paying due attention to the Charter of the UN and its provisions, she tend to focus on the recent practice of a small number of States, usually including the US and Israel, without to seriously

---

<sup>110</sup>ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, ICJ Reports 2016, p. 833, par. 40. According to Bianchi: the ICJ created a strong feeling that “nuclear disarmament should be reserved to the political arena and not addressed by the Court for judicial determination”, contributing to the “progressive disempowerment of international law (...)”.

<sup>111</sup>ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, I, op. cit., par. 42.

consider the reactions of the remaining ones, simply equating silence with support (Gray, 2018).

“(…) In the case of the Security Council, its failure, many times, to condemn a state behavior (De La Sablière, 2018; Kolb, 2018), should not be taken as proof of its legitimacy, as there are many factors that influence its attitude, with the most important of them being the right to veto, which the permanent members usually use, as their interests dictate (…)” (Gray, 2018).

Lobel and Ratner also agree with this point of view, explaining that:

“(…) to infer an authorization for the use of force either from the absolute silence of the Security Council, or from the difficult language it uses many times in its resolutions, undermines the Charter of the UN and the prohibition it sets, through article 2§4 (…)” (Ratner, Lobel, 1999).

Eliminating any doubts or different interpretations raised by the concept of silence, especially where it concerns the use of armed force, would be the constant vigilance of the Security Council which:

“(…) judging each time expressly whether to condemn or accept it (…) something like this seems difficult, even utopian, if one considers the number of cases where it has chosen the middle path, refusing to take a clear position and “tolerating” the use of force by a State (…)” (Franck, 2001).

This responsibility rests, for better or worse, with the States themselves. The State, which is not interested in the existing law of the use of force, but also in what may over time develop in a difference of States for this reason, must consider very carefully the possible consequences of a choice to observe a silent attitude as a use of force and violence against the other State. Even if silence does not equal consent to the use of violence, each of them must take a clear position in the “(…) battle between (a

State's) claims and reactions (...)” (Starski, 2016). Only in this way will it be possible to preserve the legal content of a rule, so important for the common interest and good, which is the prohibition of the use of armed force.

### **Case study: Israel's military intervention in Uganda in 1976**

The absence and silence of a large part of the States was one of the characteristics of the specific case against Israel's claims as well as the inability of the Security Council to issue any resolution.

For Nußberger and Kreß it is a great challenge:

“(...) to establish the degree to which Israel's argument, about exercising its legal right to defend itself, through the rescue of its compatriots in Uganda, was accepted or not by the international community (...)” (Nußberger, Kreß, 2018).

Israel's act and claim met with little explicit support, while on the contrary more widespread condemnation considering the general political climate regarding Israel in 1976, make it doubtful if the States that condemned its rescue operation did so on the basis of a total rejection of Israel's legal arguments and not on the basis of political motives. It is repeated that, in the end, the majority of States chose not to express any opinion on the matter, which leads to the evaluation of their silence. It must be considered whether in this case “the lack of reaction can be considered as tacit consent, since silence can speak, a state's

behavior requires a response”<sup>112</sup> and if “the circumstances were such that they required a response, within a reasonable period of time”<sup>113</sup>, as the ICJ ruled in the cases in question. This debate is an opportunity for the world to take action on the issue, which can affect the lives of all men, women and children in the world<sup>114</sup>. In fact it is true that the States knew that there was a possibility that a new rule could “crystallize” and there was a need to demand an answer to Israel's legal claim. The majority of States remained silent did not disapprove of the act using enigmatic or political language rather than legal:

“(…) it is difficult to escape the conclusion that this majority, in essence, tolerated (and thus to some extent accepted) the basic legal argument of Israel (…)” (Nußberger, Kreß, 2018).

The doctrine of the protection of compatriots in the desert (Buthard, 2020; Tomuschat, Walter, 2021), invoked by Israel in the majority became tolerated without particular reactions confirming that silence is, if not a legal, political response as a reaction to violations and violence in the sector of international law.

### **(Follows) The no-fly zones in Iraq in 1991**

Regarding the legality of the military measures of the international alliance, Wedgwood argued that: “(…) it is justified

---

112ICJ, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), op. cit., par. 121.

113ICJ, Temple of Preah Vihear, op. cit., p. 30.

114UN Doc S/PV.1939”, par. 138.

because of the violation of the terms of resolution 687 by Iraq (...)” (Wedgwood, 1998), while the Dinstein agreed: “(...) that all attacks by the alliance should be seen as a continuation of operations (...)” (Dinstein, 2011). On the contrary, O’Connell underlined:

“(...) how resolution 687 ordered economic sanctions and prohibited the initiation of hostilities until the sanctions were given a chance to work the cease-fire agreement was about the Security Council and Iraq, not an international alliance and Iraq, and therefore only the Security Council could judge its non-compliance, as well as any possible future move in case of violations (...)” (O’Connell, 2002).

O’Connell observes a paradox:

“(...) this use of armed force could normally be regarded as just as illegal as the bombing of Iraq by the international coalition, the fact that for the first one to two years after the adoption of the resolution 687 and France participated in it, while the other permanent members of the Security Council, namely China and Russia, did not condemn it, complicating the situation (...) in the case of no-fly zones, a tacit consent was observed regarding the use armed violence by the USA and the UK, which consent, if indeed it did occur, would require a new Security Council resolution to be overturned, which would condemn this new policy of the two countries. This resolution, however, would be impossible to adopt, as it would encounter the insurmountable obstacle of the “veto” exercise by the two permanent members of the Security Council, and therefore their policy could possibly be considered legitimate (...). The conclusion of the legality of the use of armed force could only be drawn if it was used to protect the no-fly zones and not to enforce the destruction of Iraq's weapons, mandated by resolution 687, in which the use of force the Security Council never agreed (...)”(O’Connell, 2002).

Marc Weller, arguing:

“(...) that both the alliance's military operations in 1991, with the no-fly zones, and those of the following year, went unnoticed (Weller, 2017) (...). They did not clearly endorse the action of the alliance, but participated in the “humanitarian intervention” of the States that intervened in Iraq, through the provision of manpower to the United Nations, and did not somehow seek to reverse its outcome (...)” (Weller, 2017).

And in this case, there is an “apathy” on the part of the international community, which translates into silence and tolerance for this type of behavior. It may be that the time was not yet ripe for corporate reactions, either because the international community in those years was still dealing with other important problems and these areas were of secondary importance to the great powers. However, we must admit that these attitudes formed the basis for us to speak more nowadays about uncontrolled violence and the death of several thousand individuals, peoples in the name of terrorism, the power of the strongest and the imposition of sovereignty on a global, regional level where the silence of certain states is not a legal act, but complicity in a criminal act of any kind, certainly unacceptable to the international community (Alland, 2021).

**(Follows): Turkish military operations in northern Iraq against the Kurdistan Workers' Party (PKK) in 2007/2008<sup>115</sup>**

In this particular case, the international community reacted in the words of Ruys, who observes that it was presented with two aspects:

“(...) some States expressed their support for Turkey and condemned the attacks carried out by the PKK in 2007 (...) called on it to seek a diplomatic solution, which would put an end to the crisis (...). This reaction of the States was motivated, mainly, by the concern about a dramatic flare-up, in the event of a Turkish invasion of northern Iraq, in the only region of the country that

---

<sup>115</sup>“Partiya Karkerên Kurdistanê”.

maintained a level of relative stability. In fact, despite their concerns, States generally maintained a “quiet stance” when Turkey proceeded with its military operations (...) (Ruys, 2008).

The US, neither approved of Turkey's operation, neither did it ever condemn it. In fact, in some cases they helped it, providing it with important information to facilitate the airstrikes:

“(...) this tolerance of the USA is explained, in particular, by the strategic cooperation it maintained with Turkey, which it did not want to harm, as well as the general war against terrorism, which it had launched a few years before (...)” (Lieblich, 2021).

Turkey did not see to provide a clear legal claim as a basis for its actions, nor did it inform the Security Council announcing the measures it was going to take against the Kurds in accordance with art. 51 of the Charter of the UN (Pellet, 2014), which it finally did, after the operations were over, in a letter to the Security Council of the UN<sup>116</sup>. According to our opinion, the lack of a clear legal position of Turkey at the same time as a behavior of pure silent reaction from the neighbors and the rest regarding the legality of its intervention in Iran made it difficult to recognize an opinion of law (*opinion juris*) in the Turkish actions and able to lead to some new customary rule and mainly to the reinterpretation of art. 51 so as to allow such criminal actions against non-state actors proving this behavior amid the universal hesitation of States to accept them (Pellet, 2014). But was the silence in this case legitimate for political reasons?

---

<sup>116</sup>“Note Verbal Dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva Addressed to the Secretariat of the Human Rights Council- UN Doc A/HRC/7/G/15,” 2008.

Of course not, since the support of States and the controversial statements they made against Turkey's right to protect its citizens proves that the silence in this case was universal support for aggressive actions that do not justify art. 51 of the Charter of the UN (Pellet, 2014). Of course, art. 51 also covered this case of armed violence, but the issue of the behavior of the international community remains in history as a political silence in the face of the non-protection of human life and dignity.

**(Follows): The US military intervention in Afghanistan in 2001**

“Operation Enduring Freedom” as a unilateral action by America and within the framework of their right to national defense against terrorist acts including armed attacks and against a State like Afghanistan (Byers, 2018) resulted once again for the international community intensely interested in criticism.

According to Byers:

“(…) the acceptance of the international community was almost universal. Both the SA, through its resolutions, as well as the reports of States that exceeded one hundred in number, as well as the tacit consent of the remaining, except for two (Cuba<sup>117</sup> and Belarus). The “almost unanimous state practice” reflected in the US intervention in Afghanistan, in 2001, must be considered as legitimate, in terms of customary law, concerning the right to defense, as it was reshaped in the wake of the terrorist attack (...) there was not so much broad acceptance on the part of the international community, as in 2001, but instead a strong tacit consent of it, which,

---

<sup>117</sup>UN General Assembly, “Verbatim Record (4 October 2001)-UN Doc A/56/PV.13,” 2001. par. 15.

however, was mainly based on the awareness of the consent of the then Afghan government (...). The silence of the States on the continuation of the US operation it should not be interpreted as support for the desire of the latter to further stay in the country (...)" (Byers, 2018).

Kirgis agrees with Byers, regarding the first stage of the operation, in 2001 arguing that:

"(...) because customary international law is often formed through a process of formal declarations and tacit consents, the absence of objection to the right in the defense put forward by the US, can be seen as indicative of (implicit) consent to a more expanded right, which includes the exercise of defense against governments, which support organized terrorist organizations, which commit armed attacks on other States (...)" (Kirgis, 2001).

Along the same lines, Reinold argued that:

"(...) it is probably fair to conclude that as a result of consent (either express or tacit) to US intervention in Afghanistan, the existing norms that regulate the use of force have been re-evaluated, while the rule set by Nicaragua (ICJ case) has lost its value as the benchmark for what constitutes an armed attack (...)"<sup>118</sup> (Reinold, 2011).

And in this case the use of non-violence, as a partial performance of criticism, the behavior of even the States that did not face the situation in the form of the use of violence is condemnable and certainly has nothing to do with the right to silence but as a choice a policy that has been adopted in other cases in our days, allowing the violation of people's rights but

---

<sup>118</sup>ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, op. cit., par. 107: "(...) it is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule (...)"

also making the violence to be silenced by the silence of States that in essence, although they do not agree, are active members of deterrence and condemnable behaviors.

**(Follows): Russia's military operations from 2002 to 2007 in Georgia against Chechen rebels**

As was natural, Russia denied its involvement in the military operations inside the Georgian territory, with a letter to the Secretary General of the UN and then claimed that it acted on the basis of its right to legitimate defense<sup>119</sup>. It accused Georgia of not effectively controlling its territory, as well as its general inability to create a safe zone along the Russian-Georgian border despite its lackluster efforts to neutralize a terrorist threat that required immediate action by each State and as Russia did and as stipulated in art. 51 of the Charter of the UN (Pellet, 2014).

Specifically, Reinold notes:

“(...) that the international reaction was “quiet”, with the only exception being the USA <sup>120</sup> (...) assessment of the consequences of a specific act for the development of customary international law, must be studied both “what States say, as well as what they don't say”, judges that state practice so far seems increasingly positive in accepting that non-state actors can launch armed attacks, which allow legitimate defense in response (...)” (Reinold, 2011).

---

<sup>119</sup>Permanent Representative of the Russian Federation to the United Nations, “Letter Dated 11 September 2002 Addressed to the Secretary-General, UN Doc S/2002/1012,” 2002. par. 2.

<sup>120</sup>Parliamentary Assembly of the Council of Europe, “Situation in Georgia and the Consequences for the Stability of the Caucasus Region- Recommendation 1580, 25 September 2002,” 2002. para. 5&11

Hakimi adds:

“(...) another interesting element in the evaluation of the international reaction (...). The great majority of the States remained silent, during the use of armed force by Russia, explains how it becomes important for the controversial doctrine of “unable or unwilling”, invoked by Russia when criticizing Georgia for ineffective control over its territory. Most States, as far as Russia was concerned, may not have explicitly approved its legal argument, but tacitly accepted the military operations carried out on its basis (...)” (Hakimi, 2015).

The use of silence and of force can be seen once again, proving that many States tolerate this type of business, as we can also see in the use of the records and declarations that they use under a new doctrine of “unable or unwilling”, which seems to be discernible in all the convictions that each State wants to attack another and amid the general silence of the non-participating States there is a general active support for the pursuit of legal status through the right to remain silent.

**(Follows): The invasion of Colombian troops into Ecuador, targeting the camp of the FARC<sup>121</sup> organization, in 2008**

Ecuador received an attack on its sovereignty and territorial integrity from Colombia when it argued that it was based on the right to defend itself and by targeting members of a terrorist organization without wishing to violate Ecuador's sovereignty.

We are talking about a purely linguistic fluency that is used in a diplomatic vocabulary for the violation of territorial integrity

---

<sup>121</sup>“Fuerzas Armadas Revolucionarias de Colombia”.

where, amidst the diplomatic turmoil that we saw in this specific case, we ended up with yet another tacit response from the international community until the US statement that made explicit reference to Colombia's right to defend against FARC attacks (Reinold, 2011). The strongest reaction came from the Permanent Council of the OAS<sup>122</sup>, which considered: “(...) the Colombian invasion as a violation of the sovereignty and territorial integrity of Ecuador, as well as the principles of international law (...)”<sup>123</sup>.

Reinold argues:

“(...) that the widespread silent to non-existent reaction of most States of the world to the military measures of Colombia, strengthens the view that wants the concept of sovereignty to include the element of responsibility for effective control of the territory of a State, a responsibility which when not fulfilled allows the relaxation of some of the restrictions set by the use of armed force in favor of the one who invokes its right to defense (...) the reaction of some of the States in the region it cannot be equated with the opposite mass acceptance, through the implicit reaction, by the majority of the rest, while questioning and judging as consequential the OAS's condemnation decision, recalling that in the past, and specifically the day after the terrorist attack in the USA, the 2001, by its resolution it had reaffirmed the inalienable right of States to self-defense, not distinguishing terrorists from the State that offers them refuge, emphasizing that those who help, support or host terrorist organizations become equally responsible for

---

<sup>122</sup>See also: Declaration on the Dominican Republic, OAS GA Dec 94 (XLVI-O/16), OAS GAOR, 46th sess, 4th plenary meeting, OAS Doc AG/DEC. 94 (XLVI O/16) (15 June 2016) 37: “(...) sometimes third states take several decades to affirm a clear *opinio juris* in relation to a specific incident, as was attested to in 2016 by the adoption of a resolution of the Organisation of American States (‘OAS’) on the role of the organisation at the occasion of the 1965 US invasion of the Dominican Republic-which was, at the time, neither condemned by the Security Council nor by the UNGA (...)”.

<sup>123</sup>Permanent Council of the Organization of America States, “Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission, OAS Doc. OAS/CP/RES.930, March 5, 2008”.

the actions of the latter (...)” (Reinold, 2011)<sup>124</sup>.

According to our opinion, this specific case is an example of invoking certain States to justify terrorist acts and organizations that were accompanied by the implicit reaction of the majority of States through the intolerance of these situations, silence and limited protest (Scharf, 2016). The same conclusion is supported by Cardiel, Davis and Macherel, saying:

“(...) how the use of violence against non-state actors in these cases, adding that of the intervention of the international alliance in Syria, in 2015, has known a more general tacit acceptance, by the international community (...)”(Cardiel, Davis, Macherel, 2018).

**(Follows): The intervention of Saudi Arabia, with the assistance of its allies, in Yemen, in 2015**

In a letter to the UN Secretary General in March 2015, Yemeni spoke:

“(...) for the previous request of the “legitimate” and ousted leader for the provision of assistance, in order to protect the citizens of the country, which, they consider, how it allows them, based on art. 51 of the Charter of the UN (Pellet, 2014), to exercise collective defense (...) they argued that the aggression displayed by the Houthi rebels posed a serious threat to peace and security in the entire wider region<sup>125</sup>(...) the possession, by the Houthis, of heavy weapons, their military presence along the border with Saudi Arabia, as well as the previous attack (in 2009) against the latter, threatened, as they said, both the region, more specifically Saudi Arabia (...)”<sup>126</sup>.

Ruys and Ferro:

---

<sup>124</sup>Permanent Council of the Organization of America States, “Convocation of the Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. OAS/CP/RES.796 (1293/01), September 19,” 2001.

<sup>125</sup>Identical Letters Dated 26 March 2015 Addressed to the Secretary-General and the President of the Security Council, p. 5.

<sup>126</sup>Identical Letters Dated 26 March 2015 Addressed to the Secretary-General and the President of the Security Council.

“(...) approved, or at least, tacitly accepted the military intervention in Yemen (Ruys, Ferro, 2018). Among those who openly supported the use of armed force were the Arab League<sup>127</sup>, the US, the UK, France and Canada (...) other States and organizations chose to adopt a more cautious stance and wording regarding the operation (...) if one excludes the expected condemnation on the part of Iran, there was no clear criticism against the military operation, while the silence on the question of its legitimacy was “deafening” (...)” (Ruys, Ferro, 2016) (...) the lack, however, this, of an exchange of views, at an international level, for the evaluation of the argument regarding the exercise of collective defense on behalf of the alliance, according to them, does not allow the case in question to be characterized as a legal fact, which supports a broad interpretation of art. 51 of the Charter of the UN (Pellet, 2014), which will allow the exercise of defense against non-state actors and even against non-imminent threats (...) (Ruys, Ferro, 2018).

Buys and Garwood-Gowers and Buys, stating:

“(...) that neither the general approval, in some cases, nor the tacit acceptance, on the part of States and international organizations, of the operation in Yemen proves a support for its legitimacy or regarding the right of unilateral humanitarian intervention, which, among other things, was invoked by the alliance, when it referred to the need to save the inhabitants from the aggression of the Houthis (...) that Security Council resolution 2216 (Garwood-Gowers, Buys, 2018), which dealt with Yemen, is of no particular importance, as its failure to condemn the operation cannot be interpreted as an acceptance of its legitimacy (...)” (Garwood-Gowers, Buys, 2018).

The silence in this particular case and the tacit consent can be interpreted as acceptance of a legal basis, where in the present case we can say that it is difficult to ascertain whether it is for territorial state defense, for humanitarian intervention that was requested as the tacit consent of the States proves that all were possible scenarios and justified and condemned by international law.

---

<sup>127</sup>Permanent Observer Of and the League of Arab States, “Note Verbal Dated 2 April 2015 to the United Nations Addressed to the President of the Security Council- April 13- UN Doc S/2015/232,” 2015. p. 14, para. 4.

**(Follows): Turkey's military operation in northeastern Syria against Kurds of PKK, PYD<sup>128</sup> and YPG<sup>129</sup> in 2019**

In the specific intervention, Turkey invoked the right to its territorial and state defense in accordance with art. 51 of the Charter of the UN (Pellet, 2014), in order to deal with the “imminent terrorist threat”<sup>130</sup>. The president of Turkey, Recep Tayyip Erdoğan, himself, from the most official international forum, that of the 74th UN General Assembly, announced his country's moves in northern Syria, showing before the heads of all States, maps that presented the region inside Syrian territory, where the settlement zone for Syrian refugees was to be established. This fact eliminates any possible argument of a State or an international organization about lack of timely knowledge of Turkey's actions in Syria.

Claus Kreß:

“(…) chooses first to reprimand NATO itself, of which Turkey is a member, as well as its other Member States, for the absence of a timely control of the latter's plans, within the framework of its competences (Kreß, 2019) (...) highlights that while many States, including those that are also members of NATO, warned Turkey not to proceed with its announced plans, “international law was absent” from all these statements (...). None of the NATO Member States called on Turkey to offer to the international community a clear legal argument explaining how its impending massive

---

<sup>128</sup>Partiya Yekîtiya Demokrat.

<sup>129</sup>Yekîneyên Parastina Gel.

<sup>130</sup>Permanent Representative of Turkey to the United Nations, “Letter Dated 9 October 2019. Addressed to the President of the Security Council- UN Doc S/2019/804”, 2019.

military operation is justified against the prohibition on the use of armed force, which article 2§4 of the Charter of the UN states (...) (Kreß, 2019)".

The only States that publicly positioned themselves and made reference to international law and its violation were Greece<sup>131</sup>, Cyprus<sup>132</sup>, Liechtenstein<sup>133</sup> and Switzerland<sup>134</sup>.

Despite the "collective failure" of NATO Member States to prevent and stop the invasion of Syria and especially the possibility of banning the use of armed force, Kreß: "(...) does not share the opinion that the operation "Peace Fountain" can somehow be justified by international law" (Kreß, 2019). The Kurdish fire against border posts that Turkey claims is almost impossible to prove, while its gigantic military operation is doubtful if it is judged necessary to fight of such a threat (Kreß, 2019).

The tacit reaction of the majority of the international community proves that the silence allowed a kind of state practice, capable of bringing about changes in the interpretation of some of the customary rules, which it seems some States do not like and which concern the right to use force, such as art. 51 of the Charter of the UN (Pellet, 2014). On the other hand, in this case,

---

131Hellenic Republic-Ministry of Foreign Affairs, "Announcement on Turkey's Military Operations in Syria", Thursday, 10 October 2019.

132Ministry of Foreign Affairs of the Republic of Cyprus, "Statement on the Turkish Invasion of Syria", 10 October 2019.

133Permanent Mission of Liechtenstein to the UN, "Statement on Twitter," 9 October, 2019.

134Head of the Department of Foreign Affairs Ignazio Cassis, "Interview on the Public Radio", 10 October, 2019.

we are allowed to say that the silence was intended to shake the international community in another direction, that of the need to respect international law and the resistance against such unjustified military operations. Perhaps this will be the demand of necessity in the future where the international community will have to fight, not through silence, but through a dynamic attitude of socialization and protection of human life.

### **Acquiescence and jurisdiction of international courts and tribunals**

In international law, there is a general prohibition for courts and internal tribunals to exercise their own jurisdiction over a conduct in practice of an organ of a State different from that of which they belong. The voluntary nature of the jurisdiction of international law is an expression of the concept of equal sovereignty of the States and implies that a judge can resolve a controversy and the parties involved have shown their own consensus without exception and with ample margin of flexibility (Wass, 2016; Kolb, 2017).

The existence of the consensus is noted by the international judge on the basis of the content of a treaty, of an express declaration, as the conduct of the parties of active and passive

nature (Rosenne, 1985; Wass, 2016)<sup>135</sup>. Within this circle we recall the institution of *forum prorogatum* which allows the parties to a dispute to remedy in the case of lack of jurisdiction of an international court or tribunal through conclusive behaviour<sup>136</sup>. The consent that legitimizes the exercise of the jurisdiction of an international court also obtains a consent that can be an omissive conduct or a mere silence<sup>137</sup>. A silence creatively reconstructed in our opinion to arouse perplexity since it is not clearly seen whether the parties involved want to resolve the dispute judicially (Kolb, 2017)<sup>138</sup>. Thus the judge can

---

<sup>135</sup>According to Rosenne: “(...) if State A by its conduct induces in State B the belief, which is acted upon, that State A will accept, or will not contest, the jurisdiction if State B brings a certain issue before the Court for decision, then State A ought not to be permitted, subsequently, to contest the jurisdiction of the Court when that issue is brought before the Court for decision (...)”.

<sup>136</sup>Haya de la Torre case, judgment of June 13<sup>th</sup>, 1951, ICJ Reports, 1951, p. 71, p. 78. Art. 38(5) of the regulations of the ICJ affirms that: “(...) when the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State (...) it shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court’s jurisdiction for the purposes of the case (...)”.

<sup>137</sup>In *Nicaragua v. United States*, op. cit., the ICJ affirms that: “(...) having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of [Nicaragua] in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under article 36, paragraph 2, of the Statute (...)”, par. 47. In case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, par. 102: “acquiescence (...) might be relevant to questions of consensual jurisdiction (...)”.

<sup>138</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, op. cit., par. 103: “(...) more often than not, a will which is described as “tacit” is simply the result of a judge’s putting a reasonable interpretation on the facts of the particular case (...)”.

apply the consensual principle of jurisdiction by highlighting the limits in practice. This means that the inaction of a State is equivalent to the manifestation of consent to resolve a dispute. The international courts thus respect the fundamental consensual principle of jurisdiction by providing a detailed motivation where the silence of one of the parties constitutes acquiescence to the establishment of a case, a passive conduct of the counterparty as well as a similar legitimate expectation. In fact, the jurisdiction based on implicit consent is qualified as exceptional and fully compliant with the principle of consensuality (Reisman, 1971)<sup>139</sup>. Consent in this case is presumed and extrapolated by a judge through an interpretation that is oriented towards guaranteeing compliance with the principle of good faith which investigates the actual subjective state of the parties (Kolb, 2017)<sup>140</sup>. Implied consent jurisdiction defines itself as creative or exceptional. A party may complain of the absence of its consent whenever the exercise of jurisdiction does not apply to an express declaration or a treaty. The judge affirms his competence (*kompetenz-kompetenz*) and with the task of verifying the valid circumstances to claim that he has not given

---

139“(...) If a communication creates an expectation of arbitration that, if not executed, will prejudice the position of the other party, jurisdiction is founded by creative as opposed to extinctive prescription (...)”.

140“(...) acquiescence and estoppel (...) could furnish a basis for an exceptional jurisdiction to be interpreted very narrowly if the important principle of consent is not to be circumvented (...) but if one looks to the substance, a kind of exceptional jurisdiction based on good faith (...)”.

his consent to a resolution of the dispute in court. The judge takes into consideration the conduct of the parties, inferring the existence of a consensus as the effect of an omission or silence. In this case the assessment will be exceptional or creative but only to the extent considered that the conduct is not likely to express the consent of the parties in dispute. In argument Robert Kolb:

“(…) identifies two hypotheses in which silence plays an important role in the exercise of the jurisdiction of an international court or tribunal. The first corresponds to the case in which the passive conduct of a party contributes to the establishment of the jurisdiction of a judicial body (…)” (Kolb, 2017).

In Temple of Preah Vihear case:

“(…) Thailand refused to recognize the jurisdiction of the ICJ by denying that it had ever issued a unilateral declaration of acceptance of the same pursuant to art. 36(2) of the Statute<sup>141</sup>. The PCIJ thus had formally ceased to exist on 19 April 1946. Thailand renewed its declaration for another ten years. Thailand argued that this latest renewal was ineffective as the validity of the original declaration had ceased with the disappearance of the PCIJ. The 1929 declaration was still in effect in 1950 and pursuant to art. 36(5) of the Statute (Liakopoulos, 2020c)<sup>142</sup>. The latter rejected Thailand's objection, highlighting, inter alia, how its conduct over time indicated its intention to comply with the content of the declaration of 1950<sup>143</sup> (...) recalling the inertia of Thailand which, up until the establishment of the case, had never bothered

---

<sup>141</sup>Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, op. cit., p. 17, 27.

<sup>142</sup>Art. 36(5) of the ICJ affirms that: “(...) declarations made under article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms (...)”.

<sup>143</sup>“(…) To sum up, when a country has evinced as clearly as Thailand did in 1950, and indeed by its consistent attitude over many years, an intention to submit itself to the compulsory jurisdiction of what constituted at the time the principal international tribunal, the Court could not accept the plea that this intention had been defeated and nullified by some defect not involving any flaw in the consent given (...)”, according to the case: Temple of Preah Vihear, op. cit., p. 34.

to express its willingness to disengage from the 1950 declaration. The “constant conduct”, an expression of consent to submit to the compulsory jurisdiction of the ICJ would translate into the prolonged silence of Thailand which, combined with the declaration of 1950, confirmed Cambodia's legitimate expectations of resolving the dispute judicially (...)” (Kolb, 2017)<sup>144</sup>.

In *Nicaragua v. United States* case (Briggs, 1985; Wagner, 1986; Greig, 1992; Wass, 2016; Kolb, 2017):

“(...) notified to the League of Nations the occurred ratification with a telegram, announcing the despatch of the official act shortly in order to formally finalize the acceptance<sup>145</sup>. However, the ratification never reached its destination, presumably being lost en route. The problem was therefore to understand whether the 1929 declaration, which undoubtedly had not entered into force, could in any case benefit, as an imperfect act, from the transfer of the jurisdiction obligation from the PCIJ to the ICJ pursuant to art. 36(5) of the Statute (...)” (Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019).

If this had been the case, the filing of the ratification would have perfected the 1929 declaration which, entering into force *ex tunc*, would have activated the jurisdiction of the ICJ.

“(...) If Nicaragua had filed a new declaration, the ICJ would still have no jurisdiction because, in the meantime, the United States had denounced its own (...). The United States complained about the lack of jurisdiction of the ICJ, emphasizing that, in view of the failure to deposit the ratification of the 1929 declaration (...) Nicaragua could not invoke the application of art. 36(2) of the Statute (...). The ICJ observed that the main function of art. 36(5) is to ensure the greatest possible continuity in the exercise of jurisdiction between the PCIJ and the ICJ (Creig, 1992) (...). Art. 36(5) also protects the only potential effects of a declaration of acceptance of jurisdiction, if the latter needs to be perfected through a subsequent act (...) starting from 1946 (...). Nicaragua was among the States that had issued the declaration of acceptance of the compulsory jurisdiction pursuant to art. 36(2) of the Statute, although sometimes it was specified at the foot of the page that the ratification of the acceptance was not deposited (...). Nicaragua, nor any other State had raised protests or asked for clarifications regarding the validity of the 1929

---

<sup>144</sup>“(...) The subsidiary argument, relating to Thailand’s “consistent attitude”, is probably best interpreted as an independent element, concerned with the application of normative principles such as acquiescence in the face of silence and conduct (...)”.

<sup>145</sup>ICJ, *Nicaragua v. United States*, op. cit., par. 15.

declaration (Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019) (...). This widespread and prolonged silence, in the opinion of the ICJ, could only validate the idea that Nicaragua had tacitly recognized the jurisdiction of the same as mandatory (...)”(Wass, 2016; Liakopoulos, 2020c)<sup>146</sup>.

Robert Kolb affirmed in this regard the following:

“(...) the adoption of a passive conduct prevents a party from raising a preliminary objection to the jurisdiction or competence of an international court or tribunal (...)” (Wass, 2016; Kolb, 2017).

The silence of the parties is noted for the purposes of applying the estoppel principle or the extinguishing prescription as we will see in the following paragraphs.

### **International responsibility of States and acquiescence**

Silence in the field of international responsibility of States has to do with omissive conduct<sup>147</sup>. Whenever a rule prescribes the adoption of an active conduct, there is an obligation to adopt an active conduct as a cause for excluding the illegality where a State refrains from fulfilling the same, and the omission constitutes a fact of nature illegal international trade (Latty,

---

146“(...) having regard to the public and unchanging nature of the official statements concerning Nicaragua’s commitment under the Optional-Clause system, the silence of its Government can only be interpreted as an acceptance of the classification thus assigned to it. It cannot be supposed that that Government could have believed that its silence could be tantamount to anything other than acquiescence (...) After all, the reality of Nicaragua’s consent to be bound by its 1929 Declaration is (...) attested by the absence of any protest against the legal situation ascribed to it (...) The Court thus has found (...) that the constant acquiescence of Nicaragua (...) constitutes a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court (...)”, parr. 39, 46, 109. See also the dissenting opinion of: H. Mosler, pp. 464-465; S.M. Svihwebel, par. 54, S. Oda, pp. 483-488; R. Jennings, pp. 540-541.

147“(...) an international wrongful act of a State may consist in one or more actions or omissions or a combination of both” Yearbook of the International Law Commission, 2001, Vol. II, Part. Two (Yearbook II, 2001), p. 32.

2010). A tort that correlates with passive conduct (Latty, 2010)<sup>148</sup>.

In Corfu Channel case:

“(…) British warships collided with naval mines still active in the Corfu channel, in the part of the sea under the jurisdiction of Albania (Wright, 1949; Yung Chung, 1959; Corten, Klein, 2012; Jackson, 2015)<sup>149</sup>. The ICJ ascertained the international responsibility of Albania for failing to warn the United Kingdom of the presence of seagoing vessels in the Corfu channel. The unjustified silence of the Albanian authorities undoubtedly constituted conduct in violation of the “most elementary considerations of humanity”, as well as the general prohibition of using one's own territory to commit an act contrary to the rights of other States (...)”<sup>150</sup>.

In Diplomatic and Consular Staff in Tehran case, the ICJ affirms:

“(…) Iran's international responsibility for its inaction in protecting the US Embassy in Tehran from the assault of some Shia students and militants (...)”<sup>151</sup>.

Prolonged silence as a conduct of a State in the face of conduct harmful to a right is evidence of a reaction that leads to the loss of the right to invoke the international responsibility of the author of the violation. We are talking about a statement found

---

148“(…) cases in which the international responsibility of States has been invoked on the basis of an omission are at least as numerous as those based on positive acts (...)”, Yearbook II, 2001, p. 35.

149Corfu Channel case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 4, pp. 16ss.

150“Elementary considerations of humanity”, op. cit. and the dissenting opinion of B. Winiarski, p. 52: “(…) in international law, every State is responsible for an unlawful act, if it has committed that act, or has failed to take the necessary steps to prevent an unlawful act, or has omitted to take the necessary steps to detect and punish the authors of an unlawful act. Each of these omissions involves a State's, responsibility in international law, just like the commission of the act itself (...)”.

151“(…) this inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States (...)”, IICK, Diplomatic and Consular Staff in Teheran, op. cit., par. 67.

in art. 45 of the Vienna Convention (Marie, 2018)<sup>152</sup> and *in tempis* codified through art. 45 ARSIWA (Liakopoulos, 2020a) which establishes the international responsibility of a State which cannot be invoked if the State which has suffered the violation has “validly renounced this right through an express manifestation (art. 45(a)) or through acquiescence (article 45(b)) (...)”<sup>153</sup>.

Art. 45 of the Vienna Convention is distinguished from art. 45 ARSIWA since we are speaking for express (art. 45(a)) and tacit (art. 45(b)) waiver which is consistent with the work of the ILC in relation to unilateral deeds. The waiver as a unilateral act (waiver) and provided for in art. 45(a) and in contrast with acquiescence does not mean that it must be explicit (Tams, 2010)<sup>154</sup>. In particular in Phosphate Lands case:

“(...) Australia argued that Nauru had implicitly renounced its right to obtain the recovery of some phosphate mines by adopting a series of conclusive actions (Merrills, 1995; Ajibola, 1998)<sup>155</sup> (...). The ICJ rejected the request,

---

<sup>152</sup>Yearbook II, 2001, p. 121.

<sup>153</sup>“(...) the responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim”, Art. 45 ARS. 64; and according to Marie: p. 103: “[l]a Commission n’a pas entendu distinguer aux articles 45 a) et 45 b) deux types d’effets, mais deux modalités de renonciation”, pag. 103.

<sup>154</sup>Yearbook II, 2001, p. 122. According to Tams: “(...) as a first requirement [for waiver], the injured State must have declared its willingness to renounce its claim. [S]uch declaration may be express or inferred from conduct (...)”.

<sup>155</sup>ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240, par. 12. Ajibola: emphasizes just how the recourse to the ICJ can in some cases act as a catalyst for direct negotiations between the parties in dispute. Regarding the indirect benefits that may derive from the exercise of the jurisdictional functions of ICJ.

but only because Nauru's conduct was not able to clearly express Australia's renunciation of the right to invoke international responsibility (...)”<sup>156</sup>.

It is understood that the international responsibility of a State correlated with acquiescence is reconstructed on the conclusive conduct, i.e. omission, inertia and mere silence (Tams, 2010). The abstention of a State from protesting against the violation of a rule of international law for a period of time supposes that it has decided to renounce for the purpose of asserting its right or part of it (Tams, 2010)<sup>157</sup>.

Art. 45(b) theoretically represents an application of the general principle that States may freely dispose of their rights<sup>158</sup>.

Art. 45(b) demands to protect the legitimate expectations of the counter-parties. The reference to the passage of a period of time due to an unjustified delay in the exercise of the action corresponds to the presumption that the State concerned has chosen to waive its right to invoke the international responsibility of the offender. Art. 45(b) thus prevents a dispute from arising for a long time after the verification of the violation of the rule of international law which strengthens the certainty of legal relations within the legal system. The acquiescence cannot express the consent of a State to waive the invoking of

---

<sup>156</sup>ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, op. cit., par. 13.

<sup>157</sup>Russian Claim for Interest on Indemnities (Damaged Claim by Russia for Delay in Payment of Compensation Owed to Russian Injured During the War of 1877-1878), Award of the Tribunal, CPA, 11 November 1912, pp. 14-15. See also the case: *Temple of Preah Vihear*, pp. 23-25.

<sup>158</sup>Yearbook II, 2001, p. 122.

international responsibility for violation of a rule of *jus cogens* (Marie, 2018).

The invocation of the international responsibility of a State for acquiescence overlaps with institutions such as estoppel by silence and the prescription of extinction. Institutes that not even the ILC has taken into consideration<sup>159</sup>.

The choice of the judge to note the loss of the right of a State in order to raise an instance in trial as an extinguishing<sup>160</sup> found its basis on art. 45 (b). This article calls for intentional silence, i.e. a legal act to invoke the extinguishing prescription contrary to silence which lacks any subjective connotation, a silence that can be qualified as a legal fact.

The acquiescence intervenes on the materiality of the right, while the prescription extinguishes on the procedural basis. The application of art. 45(b) also entails the loss of the right of a State as a result of the occurrence of an internationally wrongful act. The limitation period does not affect the existence of a right but is fundamental for the invocation of the violation of a right.

### **Opting out and acquiescence**

Art. 11 CVTL requires the express will of the State by written act or oral statement that comes from active conduct and as

---

<sup>159</sup>Yearbook II, 2001, pp. 122-123.

<sup>160</sup>Yearbook II, 2001.

conclusive behavior (Buga, 2018; Dörr, Schmalenbach, 2018). Admitting the possibility that a State can bind itself to a treaty based on passive conduct is in conformity with the rule of action-reaction and central to the role that treaty law assigns to the consent of States.

The acquiescence does not manifest a State's willingness to bind itself to a treaty that meets the opting-out procedure. It is a matter of exclusion from treaties that we see within the specialized agencies of the UN as well as treaties that have to do with the environment, the sea, international criminal law, i.e. treaties with a high level of technical difficulty (König, 2013). Whether a treaty stipulated outside an international organization can unilaterally and in the absence of humanity modify its content by notifying only the modification to the interested parties and in this case the modification is understood as a tacit agreement (Fitzmaurice, 2005; Marie, 2018).

Opting out has the effect of amending a treaty (treaty making or law making) whereas consensus decisions have to do with a mere voting waiver that has to do with a secondary law-making binding decision. The will to disengage from a treaty by acquiescence is manifested according to art. 11 CVTL and at the moment in which the treaty including the opting out procedure is concluded. This procedure is qualified as a *de facto* law formation mechanism independent of the will of the parties and

consensually envisaged in the treaty with the aim of facilitating future amendments of the same (Fitzmaurice, 2005; König, 2013; Marie, 2018)<sup>161</sup>. Art. 11 CVTL requires the willingness of a State to bind itself to a treaty which is manifested through its own active conduct (Dörr, Schmalenbach, 2018). As also art. 39 CVTL which introduces a subsequent agreement concluded according to the modality of the formation of a custom (Chang-Tung, García, 2019). The procedure of opting out does not involve the straight modification according to the modality of the notification mechanism from precise times and contemplated by every international treaty.

### **(Follows): Estoppel, history, jurisprudence, evolution**

The institution of estoppel dates from the common law.

According to Edward Coke:

“(...) the term denotes the idea that the adoption of a certain conduct could prevent (to estop) a subject from asserting a claim in the process, even when effectively founded in law (...)” (Bower, 1923; Dargent, 1943; Lauterpacht, 1970; Das, 1997)<sup>162</sup>.

---

<sup>161</sup>Marie affirms that: “(...) [l]’acte de l’organisation perd par ailleurs son caractère unilatéral puisqu’il nécessite le consentement de ses destinataires pour leur être opposable (...)”, par. 213.

<sup>162</sup>According to Lauterpacht: “(...) [W]here the Anglo-American lawyer refers to estoppel, the continental jurist will usually say that the party is “precluded” from asserting a fact or putting forward a demand (...)”. Dargent affirms that: “(...) de même qu’on utilise un tampon d’étoupe pour obstruer une voie d’eau qui (...) s’est produite dans une paroi, ainsi un plaideur emploie-t-il le moyen de l’estoppel au cours d’un procès judiciaire, comme il mettrait un bâillon aux lèvres de son adversaire pour lui interdire péremptoirement d’alléguer telle prétention qui serait en contradiction flagrante avec certains faits auxquels s’attache un caractère de vérité incontestable: et ceci a pour résultat de simplifier singulièrement les procédures (...)”.

However, we cannot speak of a univocal definition of the estoppel principle. According to Pecourt Garcia, estoppel is seen: “(...) as the impossibility of raising an instance due to contradictory conduct (...)” (Pecourt Garcia, 1962). The accent is placed on the trust that an act or declaration can generate, materializing the existence of rights and duties. Emphasizing the effects of this procedural mechanism, they identify an estoppel whenever the party to a dispute is forbidden to tell the truth before a judge without a denial of justice (D'Amato, 1969; Cottier, Müller, 2007). The principle is applied according to different meanings, frustrating the attempt to formulate a definition capable of embracing the numerous nuances of the institution: “(...) by dividing the estoppel into three categories: the estoppel by register, the estoppel by deed and l'estoppel by conduct (...)” (Martin, 1979).

The estoppel by register has to do with the administration of justice and is the first form of estoppel recognized in the common law system. It also refers to the principle of civil law, the *res judicata* or *ne bis in idem* as part of a judicial body of an identical dispute, i.e. involving the same parties, *petitum* and *causa petendi*. L'estoppel from register is contested only on certain aspects of the dispute and not on the dispute as a whole (Bowett, 1957; Martin, 1979).

The estoppel by deed has to do with the regulation in the judgment as a logic of the absolute value that the common law system attributes to the related acts stipulated by a certain form and proving a certain right. The deed will be prevented from casting doubt on the veracity of what is stated in the certificate itself (Bowett, 1957; Watson, 1970).

The estoppel by conduct (or estoppel *in pais* or equitable estoppel) was born in the distant 13th century as a certificate of transfer of ownership of a real estate property and combined by the courts with the principle of equity, as an application and manifestation of the will from which it can reasonably be deduced a certain legal situation (Martin, 1979; Thompson, 1983). The estoppel by conduct prohibits a person from presenting an application before a judge because such an application is inadequate with the principle of good faith and it was possible to expect a conduct previously adopted (Pollock, 1904; Spencer Bower, Turner, Feltham, Hochberg, Leech, 2004).

The applicability of the institution of estoppel in international law should be considered both as a rule of customary law and as a general principle of law (Moore, 1898; Martin, 1957; Macgibbon, 1958)<sup>163</sup>. However, the principle of estoppel in

---

<sup>163</sup>Spanish-United States Claim Commission, 1881; Estoppel by record; Pious Fund (The Pious Fund of the Californias (The United States of America v. The United Mexican States), Award of the Tribunal, CPA, 14 October 1902; Estoppel by deed;

international law does not have the same characteristics as that of common law (McNair, 1924; Bowett, 1957; Macgibbon, 1958; Lauterpacht, 1970; Cheng, 2006; Cottier, Müller, 2007)<sup>164</sup>. The international law knows neither the estoppel by register nor the estoppel by deed (Cottier, Müller, 2007). In the first case international law applies the principle of *res judicata* while, in the second, that of *pacta sunt servanda* (Bowett, 1957). However, the difference between estoppel by deed and estoppel by conduct tends to blur, since the value of the formal acts of the States falls within the broader and indistinct concept of practice (Cottier, Müller, 2007).

The institution of common law it refers to estoppel by conduct.

The doctrine identifies two conceptions of the same:

“(...) an “extensive” concept (estoppel *lato sensu*) and a “restrictive” one (estoppel *stricto sensu*) which follows the principle of estoppel by conduct and which coincides with what is considered the estoppel in international law (...)” (Martin, 1957).

The estoppel applies to contradictory conduct and prevents the same from raising an instance in court that it has made or reasonably implied. The ICJ applied the estoppel principle in the Factory at Chorzów case. The PCIJ:

“(...) underlined how the party to a dispute could not request the fulfillment of an obligation if the other party was unable to fulfill the same due to a conduct put in place by the party requesting the fulfillment (...)”

Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, 3 October 1988, UNRIIAA, Vol. XXVIII, p. 331, per l'estoppel by representation.

<sup>164</sup>According to Lauterpacht: “(...) [i]t is not easy to adduce reasons why (...) estoppel should be disregarded in the relations between States (...)”.

(Liakopoulos, 2020c)<sup>165</sup>.

In Interpretation of Peace Treaties case (Liakopoulos, 2020c)<sup>166</sup>:

“(…) Hungary, Romania and Bulgaria refused to appoint a representative to the Commission set up by the 1947 Peace Treaties. The Commission, whose purpose was to resolve disputes arising from the application of the Treaties themselves, was to consist of a member appointed by the Allies, a member appointed by Hungary, Romania and Bulgaria and a member appointed by the Secretary of the United Nations (...). These three States (...) refused to nominate their own representative. The Allies asked the ICJ if the Commission could not in any case be set up to resolve the dispute (...) (Martin, 1957; Macgibbon, 1958)<sup>167</sup>.

The ICJ did not express itself on the point, limiting itself to observing that, according to the Treaties, the Commission had to be composed of three members and decide by majority (...)”<sup>168</sup>.

In his dissenting opinion, judge Read accepted:

“(…) the position of the United Kingdom and the United States noting that “a defaulting government (...) would be (...) estopped from alleging its own treaty violation in support of its own contention (...)”<sup>169</sup>.

It is clear from the jurisprudence just cited that the principle of good faith is used as well as the principle of *nemo venire contra factum proprium* (McNair, 1924; Shorlow, Gore, 2022)<sup>170</sup>.

<sup>165</sup>ICJ, Case Concerning the Factory ad Chorzów (Claim for Indemnity) (Jurisdiction), PCIJ, Collection of Judgments, Series A.-No. 9, 26th July 1927, p. 31.

<sup>166</sup>ICJ, Interpretation of Peace Treaties (second phase), Advisory Opinion, ICJ Reports 1950, p. 221.

<sup>167</sup>“(…) this point may be clearer on the basis of an application of the principle of estoppel. [...] In brief, the party concerned is estopped or incapacitated from challenging the validity of the decision, because it cannot do so except by pleading its own wrong. In that case the decision would remain unchallenged in law and therefore binding”, *ibid.*, Written Statements of the Government of the United Kingdom, 11 January 1950, p.190. See also the Written Statements of the United States of America on Questions III and IV, 22 October 1949, p. 237: “(...) State can claim that its right it's denied when it refuses to avail itself of the right which it claims is denied it (...)”.

<sup>168</sup>Interpretation of Peace Treaties, p. 230.

<sup>169</sup>According to the dissenting opinion of J E. Read, p. 244 in case Interpretation of Peace Treaties.

<sup>170</sup>“[I]n international jurisprudence one finds decisions based on the *non concedit venire contra factum proprium* principle which corresponds to the Anglo-Saxon

According to Georg Schwarzenberg:

“(…) the institution prohibits a State from denying the veracity of a statement on the existence of a fact when one or other legal entities have relied on such conduct (Macgibbon, 1958; Pecourt García, 1962; Schwarzenberg, 1967; Martin, 1979)<sup>171</sup> (…). This is even more true if the conduct in question constitutes a violation of international law (*nullus commodum capere de sua injuria propria* (...))” (Macgibbon, 1957; Lauterpacht, 1982; Kolb, 2017)<sup>172</sup>.

The ICJ has confirmed the applicability of estoppel within a circle of restrictive conception (Byers, 1997; Villalpando, 2010; Ngobeni, 2012; Costelloe, 2017)<sup>173</sup> instead in cases of estoppel by silence it has tried to apply the principle in a more extensive conception (Ovchar, 2009). As we see from the opinion of judge Spender in *Temple of Preah Vihear* case:

“(…) the principle (of estoppel) operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself (...))” (Das, 1997; Kolb, 2017).

---

institution of estoppel”, *Flegenheimer Case*-Decision No. 182, 20 September 1958, UNRIIAA, Vol. XIV, p. 372, par. 63. According to McNair: “(…) [t]his is not estoppel of *nomine*, but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold (...)”, p. 35.

<sup>171</sup>According to Macgibbon: “(…) [u]nderlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation (...) State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to previous occasions. At its simplest, estoppel in international law reflects the principle of consistency (...)”.

<sup>172</sup>According to Lauterpacht: “(…) [a] State is estopped from relying on its own non-fulfilment of an international obligation (...)”, pag. 169.

<sup>173</sup>*Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, ICJ Reports 1964, p. 3, pp. 24-25. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment, ICJ Reports 1990, p. 92, par. 63. *Land and Maritime Boundary* (1998), parr. 57-58.

The principle of estoppel by silence is distinguished from the effects of acquiescence and acquisitive prescription (Lauterpacht, 1950; Macgibbon, 1954; Bowett, 1957; Barale, 1965; Blum, 1965; Sinclair, 1996; Chan, 2004; Koskenniemi, 2005; Marie, 2018). Silence is relevant for the purposes of ascertaining the acquiescence of a State with the aim of applying the estoppel principle (García García Revillo, 2015; Chandrashekhara Rao, Gautier, 2018; Le Floch, 2018; Islam, Muquim, 2020; Kirby, Hodgson, 2022)<sup>174</sup>. The differences between acquiescence and estoppel blur, as estoppel is applied in relation to acquiescent conduct (estoppel by acquiescence). In this case, the effects of acquiescence overlap with the principle of estoppel, given that acquiescent conduct in itself produces certain juridical effects and the acquisitive prescription of

---

<sup>174</sup>Application of the Convention on the prevention and punishment of the crime of genocide (*The Gambia v. Myanmar*), order of 22 July 2022, par. 41 and 368. According to the Court: “(...) questions about the legal interest or standing of the Applicant in respect of such matters and the significance of (...) the *erga omnes* character of the relevant obligations (...) any State party to the Genocide Convention (...) may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end (...)”. It rejected the application, without analyzing its admissibility and especially from the point of view of the legal standing of Bosnia and Herzegovina, as “(...) the evidence offered [did] not in any way support such a contention (...)”. see the dissenting opinion of judge Xue, that admits: “(...) resort to the Court is not the only way to protect to common interest of State Parties in the accomplishment of the high purposes of the Convention” (par. 7). See also: ITLOS, Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire) following the agreement of 2014, judgment of 23 September 2017, par. 229ss. ICJ, Obligation to negotiate access to the Pacific ocean (*Bolivia v. Chile*), Preliminary objections judgment of 24 September 2015, par. 194.

sovereign rights over a territory. On the other hand, conduct constitutes the respect on which to evaluate the applicability of the estoppel principle. Therefore, not only will the State ask the judge to ascertain the acquiescence of a right in its favor but it will highlight, due to the estoppel principle, the counter-party who will have to consider himself precluded from engaging in conduct in contrast with the effects of the acquiescent conduct previously adopted (Wittenberg, 1933; Schwarzenberg, 1955; Macgibbon, 1958; Pecourt Garcia, 1962; Chan, 2004; Orakhelashvili, 2006; Kopela, 2010; Wass, 2016)<sup>175</sup>.

The main element that distinguishes the phenomenon of acquiescence from the principle of estoppel is the existence of a consent of conduct which produces the prescriptive acquisition of a right which precludes a State from adopting a conduct contradictory to it (Bowett, 1957; Pecourt Garcia, 1962; Blum, 1965; Wagner, 1986; Thirlway, 2013)<sup>176</sup>. While for the purposes of the effects of acquiescence, silence as consent of the voluntary State decides not to oppose a conduct. Thus, the estoppel principle applies to the existence of an intentional

---

<sup>175</sup>Macgibbon affirms that: “(...) the few writers who have discussed the question had no doubt that acquiescence was (...) apt to find an estoppel (...)”; Orakhelashvili affirms that: “(...) estoppel can flow from recognition, acquiescence or waiver, and from another side of the coin in relation to them: once a State has exercised a valid recognition, waiver or acquiescence, it is estopped from contesting the situation thus established. In some cases estoppel by acquiescence is found (...)”.

<sup>176</sup>Thirlway affirms that: “(...) the time element is likely to be more material in cases of acquiescence than in cases of estoppel (...)”.

silence and to a silence: “(...) on which another State has relied in good faith and whose subsequent denial is the cause of prejudice or an unjust advantage (...)” (Wass, 2016).

The estoppel produces its effects and silence manifests the consent of the State or is intentionally maintained (Lis, 2016).

Acquiescence and estoppel by silence are two distinct institutions given that acquiescence produces legal effects only in the presence of an intentional silence and the principle of estoppel is also applied in the absence of the will of the State given that there are elements that make up the same (Thirlway, 2013)<sup>177</sup>. We cannot say that acquiescence and estoppel are relational and based on the same conduct. Of course, both are invoked in relation to a silence but in the case of acquiescence and behind the silence lies the consent and the will of the State not to protest against the conduct of another State. Silence forming part of an estoppel is characterized as constituting unequivocal conduct on which a State has legitimate reliance, and since a State has previously adopted the same it could harm the former and benefit the latter. We are talking about two different assumptions. The silence maintained by the State can be interpreted as intentional due to the intervening acquiescence and without the need to apply the estoppel which is not

---

<sup>177</sup>“(...) [F]or purposes of the estoppel the question is not whether there is a duty to speak, but simply, did the silence or non- action amount in the circumstances to a suggestion or representation of a certain fact? (...)”.

voluntary and satisfies the requirements that prevent a State from adopting an adversarial conduct (Kolb, 2017)<sup>178</sup>.

The overlap between the two institutes proves to be inconsistent with the distinction between legal act and fact and is confused with the requirements that produce acquiescence with those that preclude a State from adopting a specific conduct. As a consequence the alteration of the burden of proof and the risk of application of the estoppel principle in the absence of the existence of a State of legitimate expectations on the part of the counter-party and the occurrence of a prejudice against the latter. The difficulty remains of claiming the estoppel as proportional in its effects and likely to prevent a State from adopting a conduct beyond the existence of a consensus, i.e. a legitimate right or interest or the objective validity of its arguments (Orakhelashvili, 2006)<sup>179</sup>.

In Anglo-Norwegian Fisheries case, the ICJ:

---

178“[I]n those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel, although the language of that rule is, in practice, often employed to describe the situation (...) having accepted a certain obligation (...) cannot now be heard to deny th[is] fact (...); but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other word, if the denial can be shown to be false, there is no room or need for any *plea* of preclusion or estoppel (...)”, according to the dissenting opinion of G. Fitzmaurice in case: Temple of Preah Vihear, p. 63.

179G. Fitzmaurice: “(...) (a plea of estoppel) is essentially a means of excluding a denial that might be correct-irrespective of its correctness. It prevents the assertion of what might in fact be true. Its use must in consequence be subject to certain limitations (...)”, and according to Orakhelashvili: “[e]stoppel can bind a State to what does not amount to its intention (...)”, p. 369.

“(…) noted Norway's persistent objection (Brown, 1966; Wagner, 1986; Ovchar, 2009; Gourgourinis, 2011) (….) having refrained from raising any objection to Norway's conduct for a long period of time, the United Kingdom could no longer, “for any reason”, oppose the practice of Norwegian boats to go fishing beyond four nautical miles from the coast (Dominicè, 1986)<sup>180</sup> (….) beyond the merits of the matter, the prolonged silence it would prevent the UK from protesting an alleged violation of international law by Norway. The sentence seems to evoke the mechanism of the estoppel in an extensive conception (….)” (Dominicè, 1986).

Judge McNair in a dissenting opinion: “(…) leans towards a similar interpretation in his dissenting opinion (….)” (McNair, 1924, Macgibbon, 1958)<sup>181</sup>. The doctrine has also noted:

“(…) how this interpretation translates into a misunderstanding deriving from the substantial correspondence of the effects produced by acquiescence and estoppel (….)” (Blum, 1965).

The ICJ specified:

“(…) that no State could any longer challenge the legitimacy of Norway's conduct. This confirms that the case does not constitute an application of the estoppel principle since the latter, unlike acquiescence, produces procedural effects which are opposable only to the parties involved (….)” (Blum, 1965).

### **(Follows): The persistent objector**

In the same line of thought is the persistent objector that has to do with the consensual nature during the process of formation of customary law<sup>182</sup>. A State opposed to the emergence of a

180“(…) Great Britain's (….) prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom (….)”, in case: *Anglo-Norwegian Fisheries*, p. 139.

181McNair affirms that: “(…) the question would arise whether the United Kingdom had precluded herself from objecting to [the Norwegian system embodied in the Decree of 1935] by acquiescing in it (….)”. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 6 and the separate opinion of B. Ajibola, par. 105: “(…) [I]n this case (….) the Court first pronounced an international estoppel without actually saying so (….)”.

182ICJ, “(…) general, customary international rules, by their very nature, must have equal force for all members of the international community, and cannot therefore

custom will not be bound by custom and crystallized as a rule of international law. Regarding the silence of the States in the Anglo-Norwegian Fisheries case, the United Kingdom complained that:

“(…) the Norwegian territorial sea could not extend beyond four nautical miles from the coast and, therefore, that English fishing vessels had the right to go to fish in an adjacent sea area which Norway claimed as its own (...). Norway thus gained historical title to that sea area, which now formed part of the Norwegian territorial sea (...). Norway also underlined that it had immediately opposed the attempts of British fishing vessels to trespass in that sea area and then fixed the boundaries of its territorial sea at ten nautical miles from the coast by issuing various Decrees. The ICJ rejected the requests of the United Kingdom, observing that, although customary law prohibits the setting of the territorial sea boundary at ten nautical miles from the coast, the prohibition could not apply to Norway, because it had always opposed the validity of this custom (...)”<sup>183</sup>.

The ICJ relied on Norway's refusal to comply with the four nautical mile rule. This is a systematic interpretation considering the ICJ's recognition of the effects of Norway's persistent objection. The ICJ attached importance to the persistent objector, i.e. Norway which was accepted by the acquiescence of United Kingdom and the international community (Green, 2016). A State that does not respect the custom in formation despite being actively manifested *in tempis* shows in practice that it is not sufficient to create a persistent objection. The case

---

be subject to any right of unilateral exclusion exercisable at will by any of them in its own favour (...)", North Sea Continental Shelf, op. cit., par. 63.

183“(…) ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast (...)”, Fisheries Case (United Kingdom v. Norway), op. cit., p. 13.

under analysis does not represent a case of acquisitive prescription. The ICJ emphasized acquiescence before the practice of Norway where the tacit consent many times by the majority of States legitimized the clear conduct of a persistent objector established between the State and the international community.

In our view, it seems unrealistic for a State to oppose continuously, even forever, a customary rule, to the general application of which all other States have consented and, as practice shows, even very powerful States, even a State that are adjacent and in the past abandoned their persistent objection, in issues that, among other things, concern the law of the sea (Byers, 1997).

In award of the King of Spain:

“(...) Nicaragua challenged the validity of an arbitration award issued on 23 December 1906 by a joint Commission chaired by the King of Spain. The award delimited the border between Nicaragua and Honduras (Von Mehren, Kourides, 1981; Szazi, 2012)<sup>184</sup>. Nicaragua refused to implement the award,

---

<sup>184</sup>Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: ICJ Reports 1960, p. 192, 197. “(...) the writings of legal scholars unanimously recognize that arbitrators may decide their own jurisdiction (...). This solution which is justified by its necessity is moreover in harmony with the dual nature of arbitration. With respect to the jurisdictional nature (nature juridictionnelle) by its function in the sense that the arbitrator is vested with the duty of stating the law and in so doing by resolving the dispute which has been submitted to him, but also with respect to the contractual nature (nature conventionnelle) if one considers the origin of the arbitrators duty which is found directly or indirectly in the agreement of parties. One comes to the conclusion that the sole arbitrator is competent to decide his own jurisdiction no matter which of these two aspects one envisions in this case. If one looks at arbitration from its jurisdictional aspect, one is evidently bound to apply to the arbitrator the rule according to which any tribunal and any judge is in the first place judge of its own jurisdiction (...). A

arguing in various ways that the appointment of the King of Spain was illegitimate and that the award, being contradictory and incomplete, should be declared invalid (...). Honduras stated on the contrary that there was no reason to declare the award invalid and that, after almost sixty years of inertia, it should be assumed that Nicaragua had accepted the delimitation of the border thus established (...). It rejected Nicaragua's requests, noting how this at the time, had not expressed any perplexity about the appointment of the King of Spain to the presidency of the Commission or, more generally, about the validity of the award and that this circumstance, combined with the weakness of Nicaragua's arguments, prevented calling into question the applicability of the award after a long time<sup>185</sup>. Honduras referred to the effects deriving from the acquiescent conduct of Nicaragua to justify the acquisition prescription of the territory according to the border drawn in the award<sup>186</sup>, but the ICJ seems to ignore this observation<sup>187</sup> (...) the concept of acquiescence and not that of estoppel are mentioned in the pronouncement (...)”<sup>188</sup>.

The ad hoc judge Urrutia Holguín argued:

“(...) that this omission was not accidental, considering that neither of the two institutes could actually apply to the dispute. On the one hand, Nicaragua had expressed its opposition to the solution reached by the Commission, already a

---

customary rule which has the character of necessity derived from the jurisdictional nature of the arbitration confirmed by case law more than 100 years old and recognized unanimously by the writings of legal scholars (...) require that the sole arbitrator should be competent to decide his own jurisdiction (...)” (Texaco overseas petroleum company et californian asiatic oil company v. Gouvernement de la République arabe de Libye, unique arbitral, P.M. Dupuy, sentence of 27 November 1975, in ILR, LIII, pp. 393ss).

185“(...) [T]he Court considers that, having regard to the fact that (...) no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator (...) it is no longer open to Nicaragua to rely on [any] ground for the nullity of the Award (...) Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua’s failure to raise a question with regard to the validity of the Award for several years (...) further confirms [this] conclusion (...)”, pp. 209, 213, according to the separate opinion of P. Spender, p. 219: “[a]lthough I incline strongly to the view that the appointment [of the King of Spain as arbitrator] was irregular, this contention of Nicaragua fails because that State is precluded by its conduct prior to and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the Award (...)”.

186Reply submitted by the Government of the Republic of Honduras, 3 August 1959, par. 23-25.

187See the declaration of L.M. Quintana, p. 218.

188See the declaration of L.M. Quintana, p. 218.

few years after the publication of the award, asking Honduras to institute an appeal procedure. By doing so, Nicaragua would have averted the effects of acquiescence<sup>189</sup>(...). On the other hand, the lack of evidence as to the existence of a legitimate expectation, as well as the occurrence of damage, would exclude the applicability of the estoppel principle (...). The ICJ does not seem to be too concerned with ascertaining the existence of the necessary elements in order to correctly invoke the estoppel, limiting itself to stigmatizing the inconsistency of Nicaragua's conduct (...). He would therefore not have applied an estoppel but the more general principle of *nemo venire contra factum proprium* (estoppel) (...)" (Martin, 1979; Sinclair, 1996; Thirlway, 2013).

The doctrine affirms that:

"(...) the decision is undoubtedly open to criticism. However, it dates back to a period in which the two conceptions of estoppel were equally accepted and the ruling is not based exclusively on the application of estoppel (...)" (Sinclair, 1996).

The ICJ highlighted Nicaragua's contradictory conduct to refute the already weak claims presented. Thus it is represented as a case that finds application to the principle *allegans contraria non audiendus est*.

In Temple of Preah Vihear case, the ICJ because of the:

"(...) ambivalence of the facts of the case may lead the judge to apply indifferently the institution of acquiescence and that of estoppel in resolving a dispute (Dominicè, 1986)<sup>190</sup> (...) it has been said how and within what limits the prolonged silence maintained by Siam in the face of Cambodia's conduct has produced the acquisitive prescription of the rights of sovereignty over the temple of Preah Vihear and the surrounding territory in favor of this last (...) specified that, even admitting that Siam had not given its consent to the delimitation of the border with Cambodia as established in the 1908 map, Thailand, after fifty years, could no longer oppose the assignment of the temple of Preah Vihear to Cambodia, having also enjoyed in this long period of time the advantages deriving from a stable definition of the border between the two Countries<sup>191</sup> (...) the statement seems to substantiate itself in a mere argument *ad abundantiam*, given that the ICJ then observed that from

<sup>189</sup>See the dissenting opinion of F.J. Urrutia Holguín, pp. 235ss.

<sup>190</sup>ICJ, Temple of Preah Vihear, op. cit., the separate opinion of R.J. Alfaro, pp. 39-51 and of G. Fitzmaurice, op. cit., pp. 62- 65.

Thailand's conduct it was in any case possible to infer the existence of a consensus regarding the delimitation of the border with Cambodia as established in the 1908 map (...). In fact, it recalled the applicability of the estoppel in the subordinate condition of acquiescence and for the sole purpose of demonstrating how, even in the absence of a consent from Thailand, the latter had by now lost the right to challenge the contents of the 1908 map. The ICJ thus draws a clear distinction between acquiescence and estoppel, basing the same on the element of consent, necessary to invoke the effects of acquiescence, but irrelevant to apply the estoppel (...)" (Chan, 2004; Gourgourinis, 2011).

Although the Temple of Preah Vihear is a case of acquisitive prescription of sovereign rights over a portion of territory, the ICJ and the doctrine have described the ruling as an application of the estoppel (Martin, 1979; Wagner, 1986; Chan, 2004; Orakhelashvili, 2006). Vice-President Alfaro dedicated:

"(...) to an in-depth survey of the estoppel institute which he identified as the general principle underlying the decision<sup>192</sup>. Subsequently (...) however, he refused to adopt a clear notion of estoppel, equating the principle to the idea of foreclosure and, even, to the concept of acquiescence<sup>193</sup> (...) he had here in mind an extensive conception of estoppel, coinciding with the principle of *nemo come contra factum proprium* (...)"<sup>194</sup>.

191"(...) Even if there were any doubt as to Siam's acceptance of the map in 1908 [...] the Court would consider, in light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. [...] It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, that she was ever a consenting party to it (...)", ICJ, Temple of Preah Vihear, op. cit., p. 32.

192See the opinion of R.J. Alfaro, p. 39.

193"(...) the principle (...) has been referred to by the terms "estoppel", "preclusion", "forclusion" and "acquiescence". I abstain from adopting any of these particular designations, as I do not believe that any of them fits exactly to the principle or doctrine as applied in international cases (...)"

194"(...) [w]hatever term or terms be employed to designate this principle (...) its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (...) the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international

Judges Wellington Koo and Spender also interpreted the case:

“(…) as an application of the estoppel and as a restrictive conception of the principle. They complained about the lack of the necessary elements (such as the proven existence of Cambodia's legitimate expectation of Siam's silence) to be able to apply the principle to the dispute, criticizing the choice of the ICJ to declare Thailand no longer entitled to discuss the delimitation of the border with Cambodia due to the passive behavior previously adopted (…)” (Kelly, 1963; Chan, 2004).

Judge Fitzmaurice agreed:

“(…) with the decision of the ICJ and, while pointing out the similarity of the effects between acquiescence and estoppel<sup>195</sup>, he highlighted how the two institutes must be considered autonomous and, indeed, mutually exclusive (….) qualified the sentence mainly as an application of the principle of acquisitive prescription, although considerations related also to the estoppel mechanism and, more generally, to the principle of good faith could be found within it (….)” (Zoller, 1977)<sup>196</sup>.

The Temple of Preah Vihear case is criticized by the doctrine as an application of the estoppel that tends to take a position similar to that of judge Fitzmaurice and to underline the dual role played by the silence of Siam in resolving the dispute. A conduct suitable both for producing the acquisition of a right and for invoking an estoppel (Jennings, 1963; Thirlway, 2014).

---

tribunal is precluded from claiming that right (*venire contra factum proprium non valet*) (….)”, p. 40.

<sup>195</sup>“(…) acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect (…). On that basis, it must be held in the present case that Thailand's silence, in circumstances in which silence meant acquiescence, or acted as a representation of acceptance of the map line, operates to preclude or estop it from denying such acceptance, or operates as a waiver of her original right to reject the map line or its direction at Preah Vihear (….)”, according to opinion of G. Fitzmaurice, pp. 62-63.

<sup>196</sup>See the opinion of G. Fitzmaurice, pp. 64-65.

Over time the ICJ has followed a narrower and more cautious path (Sinclair, 1996; Orakhelashvili, 2006)<sup>197</sup>. In Gulf of Maine case:

“(...) Canada issued official permits for the exploration and exploitation of oil resources located in the Gulf of Maine, an area bordering the United States and whose delimitation had never been established with precision (...)”<sup>198</sup>.

Canada argued that, since the United States had not raised any protest against the issuance of these permits until the early 1970s, it could not now complain about the illegality of its conduct. The ICJ denied the validity of this request, emphasizing, on the one hand, the brevity of the time elapsed before the United States reacted to Canada's conduct and, on the other hand, the difficulty of ascertaining Canada's legitimate reliance on the silence of the United States given that, as early as 1965, the United States had also begun to issue permits similar to those of Canada. Thus he excluded not only the existence of a tacit consent behind the inaction of the United States, but also the possibility that the conduct of the United States could reasonably lead Canada to believe that such consent existed<sup>199</sup>. In this case, the ICJ defines silence as “imprudent” and

---

<sup>197</sup>According to A. Orakhelashvili: “(...) estoppel is not easily found in jurisprudence and its use is more exceptional than usual. The reluctance of the International Court of Justice to refer to th[is] principle (...) must be noted (...)”.

<sup>198</sup>ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit., p. 40.

<sup>199</sup>ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit., p. 40.

“ambiguous” and as not sufficient to be able to invoke the effects of the estoppel<sup>200</sup>.

In El.Si case, where:

“(…) Italy contested the legitimacy of the intervention in diplomatic protection by the United States in favor of a Sicilian company controlled by two US companies (….) it maintained that the company had not respected the rule of the prior exhaustion of domestic appeals and, therefore, that the intervention of the United States was not admissible. The United States objected in this regard that Italy had been clearly informed that the United States considered the attempts to obtain justice before the Italian courts promoted by the Sicilian company as suitable for satisfying this requirement (….) it should have declared the application no longer admissible by virtue of the principle of the estoppel (….) it rejected the request of the United States, noting that, although an estoppel can be built on silence, the absence of a response to a comment by the other party in the course of diplomatic exchanges preceding the establishment of the dispute was not in itself relevant to that end (….)” (Liakopoulos, 2020c)<sup>201</sup>.

In the Territorial Dispute case, Libya did not recognize the validity of its border with Chad<sup>202</sup>. In particular, the ICJ:

“(…) rejected Libya's request to draw a new border, reconstructing its existence from an analysis of the 1955 Franco-Libyan Friendship Treaty (….) contains no references to the principle of the estoppel, although the prolonged silence maintained by Libya in the face of the delimitation of the borders of Chad operated by France (then a colonial Power) may have played some role

---

200“(…) While it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration on Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of estoppel, seems to be going too far (…). [T]he United States attitude towards Canada was unclear and perhaps ambiguous, but not to the point of entitling Canada to invoke the doctrine of estoppel (….)”, parr. 140-141.

201ICJ, Elettronica Sicula SpA (ELSI) between United States and Italy (order for the constitution of the chamber of 2 March 1987, ICJ, Reports, 1987, par 54: “(…) [T]here are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges (….)”.

202ICJ, Territorial controversy, Libya v. Chad, sentence of 4 February 1994, ICJ, Recueil, 1994, par. 17.

in the resolution of the dispute (...) (Liakopoulos, 2020c)<sup>203</sup>.

The institute of estoppel by silence has been presented and rejected in Jan Mayen<sup>204</sup>, Land and Maritime Boundary, Application of the Convention on Genocide and Pedra Branca/Pulau Batu Puteh (Robertson, 2020)<sup>205</sup>. The ICJ has denied the application of the principle either due to the lack of one of the necessary requirements or because it is relevant that the silence of a party is not an exclusive reference to the production of the effects of acquiescence.

### **Expiring prescription: From Brig Macedonian to Ambatielos**

The statute of expiring prescription applies to international jurisprudence and to the declaration of the inadmissibility of a dispute even though the principle has been frequently invoked in classical international law (Kolb, 2017).

The first case dates back to 1953 (the Brig Macedonian case), when:

“(...) the United States asked Chile for damages following the illegal seizure of a US brig (...). The facts date back to 1819. The United States requested compensation for damages in 1841 (...) (Moore, 1898). Chile replied by emphasizing that the passage of more than twenty years from the date of the

---

203According to judge B. Ajibola, par. 114: “(...) I am convinced that, by the silence and conduct of Libya, there is, without doubt, a strong case for saying, in favour of Chad, that Libya is estopped from denying the 1955 Treaty boundary (...)”.

204Maritime Delimitation in the Area between Greenland and Jan Mayer, Judgment, ICJ Reports 1993, p. 38, pp. 53-55, see also the separate opinion of Ch. Weeramantry, op. cit., par. 229.

205Pedra Branca/Pulau Batu Puteh, par. 228.

seizure entailed the loss of the right of the United States to make such a request (...) the United States denied that the institution of the extinctive prescription was applied between sovereign subjects and, consequently, that their own law could be considered prescribed. The King of Belgium confirmed the US position, granted the request and proceeded to quantify the compensation for the damage (...)”<sup>206</sup>.

In arbitral case *Williams* (1890) the principle of extinguishing prescription finds full application<sup>207</sup>, where:

“(...) it was observed that the extinguishing prescription is an institution of natural law recognized in the majority of domestic legal systems and which, as such, cannot but also find application in international law (Ibrahim, 1992) (...) the Commission did not fail to address, even without making direct reference to it, the main argument raised by the United States in *Brig Macedonian*, namely that the principle of sovereignty would imply the right for States to exercise diplomatic protection in court without time limitations (...). Arbitrator Little highlighted the function of the extinguishing prescription as an instrument capable of guaranteeing the stability of legal relations and peace between States<sup>208</sup> (...) even if international law does not impose a fixed term on States to act to protect their reasons or those of one of its citizens, this would not be sufficient to excuse the existence of an unreasonable delay (...). The commission therefore rejected the requests of the United States and declared the right to claim compensation for damages barred (...)”<sup>209</sup>.

---

206The *Alsop Claim* (Chile, United States), 5 July 1911, UNRIAA, Vol. XI, p. 349) George V of United Kingdom declared that: “(...) [t]he principle of the limitation of actions does not, in our opinion, operate as between States. It is based upon the theory that the party had a right of action capable of being enforced by legal proceedings, neglect of which should in time relieve the debtor from further liability, but as against, or between, sovereign States this rule does not apply (...)”, p. 370.

207Case of *John H. Williams v. Venezuela*, Decision of the Commissioner, Mr. Little, 1890, UNRIAA, Vol. XXIX, p. 279.

208Case of *John H. Williams v. Venezuela*, Decision of the Commissioner, Mr. Little, op. cit., p. 286.

209The arbitral *Findlay* confirm the position in the arbitral case: Little in *Loretta G. Barberie* (Case of *Ann Eulogia García Cádiz* (*Loretta G. Barberie*) v. *Venezuela*, Opinion of the Commissioner, Mr. Findlay, 1890, UNRIAA, Vol. XXIX, p. 293), affirmed that: “time itself is an unwritten statute of repose (...) A stale claim does not become any the less so because it happens to be an international one, and this tribunal in dealing with it cannot escape the obligation of a universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed (...)”, p. 298.

In the Pious Fund award, in 1898 the United States:

“(…) demanded from Mexico the payment of certain interests due on the basis of a dispute dating back to 1869 (…) the parties agreed to refer the matter (…) which pronounced in 1902. Mexico argued that, after almost thirty years, the right of the United States to receive payment should be considered time-barred (…) Mexico linked the extinction of United States law at the international level to the statute of expire prescriptions at the international level. In essence, since according to Mexican law the right of the United States to take action for the payment of interest was time-barred, it had to be deemed time-barred in every judicial venue<sup>210</sup> (…) The United States objected that the application of Mexican law was irrelevant (…) or any other international court (…) the statute of expire prescriptions, it was argued, is not an institution of material law, but procedural (…) the fact that the right to obtain payment of interest on a certain sum was no longer enforceable in a Mexican court did not prevent the United States from invoking the same in a different place (…) accepted the request of the United States, noting that the extinguishing limitation is an institution that belongs exclusively to private law and therefore cannot find application in a dispute between two States<sup>211</sup> (…) this passage constitutes an important precedent for denying the existence of the extinction limitation in international law. However, this is an interpretation that does not take into account the position adopted by Mexico in the proceeding (…) it limited itself to pointing out that, as highlighted by the United States, the limitation period accrued pursuant to Mexican law cannot be applied in a dispute between two States, as an institution governed by private law (…)” (Ibrahim, 1992)<sup>212</sup>.

The institute found further confirmation at the beginning of the 20th century in some disputes between Italy and Venezuela, where it decided to form a joint commission set up in The

---

<sup>210</sup>Pious Fund, Sentence of 14 October 1902, p. 42.

<sup>211</sup>“(…) [L]es règles de la prescription, étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux Etats en litige (…)”, p. 13.

<sup>212</sup>In *Gentini* arbitral affirmed that: “(…) in *Pious Fund*, t]he permanent court of arbitration has never denied the principle of prescription, a principle well recognized in international law, and it is fair to believe it will never do so (…)”, p. 556. In the same opinion in case: *George W. Cook, (George W. Cook (U.S.A.) v. United Mexican States*, 3 June 1927, UNRIAA, Vol. IV, p. 213).

Hague and chaired by Jackson H. Ralston<sup>213</sup>. Subsequent awards affirm the validity of the institution which dates back to the 20th century in conjunction with the first codification of the same general principle of arbitration and by the Institute of International Law<sup>214</sup>. Within this circle we recall the Cayuga Indians case<sup>215</sup>, where:

“(...) the United Kingdom intervened in diplomatic protection in favor of the Cayuga Nation of Canada which complained of the non-payment of an annual sum owed by the State of New York in accordance with a treaty concluded in 1789 (...)”.

The payments stopped starting from 1810, but the United Kingdom (then a colonial Power in Canada) notified the United States of the violation of the treaty only in 1899. They argued that after so long the United Kingdom's claim for damages on behalf of the Cayuga Nation should be deemed inadmissible due to the statute of expire prescriptions. The evident delay of the United Kingdom in the exercise of diplomatic protection, especially in consideration of the fact that the Cayuga Nation had warned the British authorities already the following year for the non-payment of the sum due. It deemed the Cayuga Nation's claim uncollectable under the termination of the United

213Gentini case (of a general nature), 1903, UNRIAA, Vol. X, p. 551, pp. 553-554, 556, 558; Tagliaferro case (of a general nature), 1903, *ibid.*, p. 592, p. 592; Spader et al. Case, 1903-1905, *ibid.*, Vol. IX, p. 223, p. 224; Giacomini case (of a general nature), 1903, *ibid.*, Vol. X, p. 594, p. 595; Irene Roberts Case, 1903-1905, *ibid.*, Vol. IX, p. 204, p. 207; Stevenson case (interlocutory), 1903, *ibid.*, p. 385, p. 386.

214Annuaire de l'Institut de Droit International, Vol. 32 (1925), pp. 558 ss.

215Cayuga Indians (Great Britain) v. United States, 22 January 1926, UNRIAA, Vol. VI, p. 173.

Kingdom's right to act under diplomatic protection. It would have resulted in an evident injustice due to the erroneous application of the institute of the extinguishing prescription<sup>216</sup>. The Cayuga Indians case represents an example of the extinctive prescription that has been applied by international jurisprudence to pursue purposes other than those traditionally attributed to this institution, namely equity, justice and the stability of juridical relationships as an instrument directed towards peace and justice between States.

In Ambatielos case:

“(...) the United Kingdom stipulated the purchase of nine steamships from Nicolas Ambatielos, a Greek shipowner. Afterwards, Mr. Ambatielos complained of the failure of the British authorities to comply (Zimmermann, Tams, Oellers-Frahm, Tomuschat, 2019)<sup>217</sup>. Greece intervened under diplomatic protection in 1925, but the dispute was submitted to an arbitral tribunal only in 1955 (...). The United Kingdom invoked the limitation period of Mr. Ambatielos (...)”.

Greece had however timely intervened under diplomatic protection and that the dispute had developed in the exchanges of diplomatic notes in the following years<sup>218</sup>. The award is important because it is specified that a time limit within which

---

216“(...) [N]o laches can be imputed to the Canadian Cayugas who, in every way open to them, have pressed their claim to share in the annuities continuously and persistently since 1816. In view of their dependent position, their claim ought not to be defeated by the delay of the British Government in urging the matter on their behalf (...) on the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act (...)”.

217The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), 6 March 1956, UNRIAA, Vol. XII, p. 83, pp. 92 ss.

218The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), op. cit., pp. 92 ss.

to declare a right extinguished the extinguishing prescription applies and not as subject to a wide margin of discretion on the part of the judge<sup>219</sup>.

Moving from arbitral awards to the jurisprudence of the ICJ we note that in the Temple of Preah Vihear case the ICJ:

“(…) attributed to the long period of time that elapsed before Thailand raised the question of its borders with Cambodia (…) the acquisitive prescription, or an application of the estoppel principle (…)” (Kolb, 2017)<sup>220</sup>.

In the LaGrand case, Germany complained of the violation by the United States of a precautionary measure issued by the ICJ on 3 March 1999. It ordered the suspension of the enforcement proceedings against Walter LaGrand, a German citizen detained in Arizona (Robert, 1999; Heinlein, 2010; Baker, 2014; Galbraith, 2019)<sup>221</sup> on the basis of an order issued by the Supreme Court, executing Mr. LaGrand. This position was not tenable due to the suspicious timing that had characterized Germany's intervention in favor of Mr. LaGrand. The German

219“(…) It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (…) there is no doubt that there is no rule of international law which lays down a time limit with regard to prescription, except in the case of special agreements to that effect, and accordingly (…) the determination of this question is left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate (…)”. See in argument: García Amador, Third Report, op. cit., V. García Amador, Report on international responsibility (UN Doc. A/CN.4/96), 1956, par. 189; parr. 27-28. *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, 24/27 July 1956, UNRIAA, Vol. XII, p. 155.

220“(…) t[his] case can be read as an instance of “extinctive prescription” by acquiescence and estoppel (…)”, pag. 132.

221ICJ, *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466.

authorities had been aware of the situation since 1992 but, for no apparent reason, decided to intervene under diplomatic protection before the ICJ only the day before the execution. The United States did not expressly invoke the limitation of Germany's right to act in Mr. LaGrand but underlined that the unjustified delay in the exercise of the same had forced the ICJ to issue an order of precautionary measure *inaudita altera parte*, thus violating the principle of equality of arms in the process. Germany recognized the validity of the statute of expire prescriptions in international law but highlighted the absence of a specific time limit for initiating diplomatic action and concluded that, given the circumstances, its intervention could be considered timely<sup>222</sup>. It limited to noting that Germany's delay was theoretically open to criticism but that the precautionary measures had been issued and that the United States had not complied with them. Consequently, Germany's request had to be considered admissible<sup>223</sup>.

In Phosphate Lands case the ICJ:

“(...) recognized the existence of the extinction limitation in international law in a clearer way. Australia complained that the small State of Nauru, despite

---

222“(...) Germany acknowledges that delay on the part of a claimant State may render an application inadmissible but maintains that international law does not lay down any specific time-limit in that regard (...)”, par. 56.

223According to S.M. Schwebel: “(...) Germany would have brought its Application years ago, months ago, weeks ago or days ago (...) profound reservations about the procedures followed both by the Applicant and the Court (...)” LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p. 9, Separate Opinion, p. 17.

having achieved independence in 1968, was raising the question of the recovery of some phosphate mines, the exploitation of which had been granted to the Australian authorities by the UN in 1947, only starting 1983. The delay of the Nauru authorities in asserting their requests would therefore have constituted a reason for the inadmissibility of the dispute, also because it was potentially prejudicial to the procedural position of Australia<sup>224</sup> (...) according to what can now be defined as the standard formula used by jurisprudence, stated that the extinguishing prescription is a principle of general international law, even if a precise time limit is not found within which to declare a right extinguished<sup>225</sup> (...) it is up to the judge to assess from time to time whether the extinguishing prescription is capable of producing the its effects in the concrete case<sup>226</sup> (...). The ICJ kept the two elements separate: on the one hand, it in fact ascertained that, by virtue of the continuous relations between the two States from 1968 to the beginning of the proceeding, the expiry of the term had been interrupted; on the other, it reserved “in due course” to ensure that the Nauru delay did not result in damage to Australia. It established firstly that, despite the passage of time, Nauru's right to claim the recovery of its phosphate mines from Australia had not expired and, secondly, that, even if the delay would prejudice the procedural position of the Australia, it would have guaranteed the absence of negative repercussions for the resolution of the dispute (...)”<sup>227</sup>.

The ICJ has not qualified the element of damage related to the principle of the statute of expire prescriptions. An idea that is confirmed in the dissenting opinion of Vice President Oda where he noted that:

“(...) the amount of time that elapsed between the achievement of Nauru's independence and the initiation of diplomatic contacts with Australia was in itself sufficient to declare the dispute time-barred (...)”<sup>228</sup>.

---

224ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, op. cit., par. 32.

225“(...) The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard (...)”, *ibid.*, par. 33.

226“(...) It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible (...)”.

227ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, op. cit. Par. 33.

The validity of the statute of expire prescription has also been recognized in the field of human rights<sup>229</sup> and international investment law<sup>230</sup>, but topics outside our research.

The extinguishing prescription is an institution of international law. It should be noted that the fact that it decides to resolve an international dispute through the intervention of a judge represents a sovereign prerogative that does not encounter limitations. The extinguishing prescription is a principle of domestic law that does not apply within the international legal system. The institution is not suitable to be governed by

---

<sup>228</sup>See in Phosphate Lands, the dissenting opinion of Oda, op. cit., par. 28. The separate opinion of T.M. Ndiaye, par. 39; and the separate opinion of A. Lucky, par. 1: “(...) acquiescence, estoppel and extinctive prescription (...) are equitable reliefs that are recognised in general principle of law both international and municipal (...)”.

<sup>229</sup>European Court of Human Rights (ECtHR), Kocherov and Sergeyev v. Russia of 29 March 2016; Cyprus v. Turkey of 12 May 2014: “(...) The Court concludes, accordingly, and subject to its subsequent considerations on the issue of private parties (...) that the matters complained of in the instant application fall within the “jurisdiction” of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention (...) as to the applicant Government's further claim that this “jurisdiction” must also be taken to extend to the acts of private parties in northern Cyprus who violate the rights of Greek Cypriots or Turkish Cypriots living there, the Court considers it appropriate to revert to this matter when examining the merits of the specific complaints raised by the applicant Government in this context. It confines itself to noting at this stage that the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention (...)”.

<sup>230</sup>Canfor Corporation v. United States of America; Terminal Forest Product Ltd. v. United States of America, Order of the Consolidation Tribunal, UNCITRAL, 7 September 2005, par. 165; Grand River Enterprises Six Nations Ltd. et al. v. United States of America, Decision on Objections to Jurisdiction, UNCITRAL, 20 July 2006, par. 33; Wena Hotels Ltd. v. Arab Republic of Egypt, Case No. ARB/98/4, Award, ICSID, 8 December 2000, par. 106: “although local statutes of limitation cannot be invoked to defeat an international claim, international tribunals may consider equitable principles of prescription to reject untimely claims (...)”.

customary law and the absence of a time limit produces unpredictable and non-arbitrary effects (Ibrahim, 1992).

Time limit and delay are two peculiarities of distinction between extinctive prescription in international law. In domestic legal systems, the concept of delay is quantified as a number of years which constitutes a time limit within the assessment of a right in court and when this time limit expires, it prescribes the possibility for a State to submit the resolution of a dispute to an international judge (King, 1934; Ibrahim, 1992; Marie, 2018)<sup>231</sup>. Nowadays customary law does not provide for any time limit in which the State must intervene in diplomatic protection and must raise formal protests in the face of the violation of one of its rights in order for the principle of limitation to unfold its effects. The delay must be unjustified due to the negligence of the legal entity of the State intervening in diplomatic protection. The delay in filing the dispute depends on the conduct of the defendant who can rely on the principle of limitation to support the inadmissibility of the other party's claims<sup>232</sup>.

### **Defendant and the existence of prejudice**

---

<sup>231</sup>Gentini case, op. cit., p. 561. The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), op. cit., par. 103-104; ICJ, Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, op. cit., par. 201.

<sup>232</sup>See, J. Crawford, Third Report, op. cit., par. 259.

An unjustified delay is not necessarily sufficient to apply the statute of limitations principle and the passage of time had not caused tangible damage to the defendant (King, 1934; Ibrahim, 1992; Tams, 2010). In the Loretta G. Barberie case, the international judge highlighted for the first time:

“(...) the relationship between the delay in the presentation of the dispute and the production of damage to the State sued, one of the reasons according to the which Arbitrator Findaly declared the right of the United States to act under diplomatic protection to protect the interests of the heir of a musket seller who had a large claim against Venezuela barred is that the delay in filing the dispute had resulted in the loss evidence, making it impossible for the Venezuelan authorities to prove that, in fact, the muskets had never been delivered and that the claim for compensation was unfounded (...)” (Ibrahim, 1992)<sup>233</sup>.

In the Gentini case, the mixed commission underlined:

“(...) that the principle of the extinguishing prescription has its legal basis in the need that the negligent conduct of the plaintiff cannot result in a disadvantageous position for the defendant (...)”<sup>234</sup>.

In Giacopini, Tagliaferro, Stevenson, Cayuga Indians and Ambatielos, one of the reasons that led the judge to exclude the application of the principle of extinction was that: “the passage of time could not be considered liable to have caused damage to the counter-party (...)”<sup>235</sup>. As also in the LaGrand case, judge Buergenthal criticized the decision of the ICJ to accept

233“(...) Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence, by which the equality of parties is disturbed or destroyed and, as a consequence, renders the accomplishment of exact or even approximate justice impossible (...)”, Loretta G. Barberie, p. 298.

234“(...) the principle of prescription finds its foundation in the highest equity, the avoidance of a possible injustice to the defendant (...)”, Gentini case, p. 558.

235Giacopini case, op. cit. p. 595; Tagliaferro case, p. 593; Stevenson case, p. 386; Cayuga Indians case, p. 189; The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), op. cit., par. 104.

Germany's request:

“(...) to ascertain the responsibility of the United States for not having complied with the order of precautionary measures, he emphasized the “prejudicial consequences” which the negligence of the German authorities had caused to the United States (...)”<sup>236</sup>.

Some authors have instead denied that:

“(...) the existence of a detriment for the defendant deriving from the unjustified delay in the presentation of the dispute constitutes a decisive element for the purposes of applying the principle of extinction limitation (...) to be identified in the ratio of the institute. Indeed, according to these authors, the purpose of the extinguishing prescription is not to prevent the defendant from suffering damage due to the delay, but to penalize the negligence of the party who does not promptly invoke the violation of one of his rights (O'Connell, 1970). Also in the internal legal systems, the function of the extinguishing prescription is exclusively that of guaranteeing the stability and certainty of the legal relationships (...) the presence of a prejudice for the defendant would be an irrelevant circumstance (Borchard, 1915; Vallat, 1966; Ibrahim, 1992) (...) of a position which not only is not reflected in international practice but which risks creating confusion between the institution of the extinguishing prescription and other concepts similar to it, such as the acquisitive prescription and the estoppel (...). Once the harm element is removed, the argument that prolonged inaction in the face of a violation entails the loss of the right to invoke another State's liability in litigation comes closer to the effects of acquiescence than to those of extinguishing prescription. To stigmatize the negligent conduct of a State by stating that, after years of silence, it can be precluded from acting to protect its right before an international tribunal or court is a reasoning that recalls the extensive conception of the estoppel, rather than the extinguishing prescription (...)” (Ibrahim, 1992).

The period of time elapsed between the presentation of the dispute and the initiation of the judicial proceeding is one of the elements that the judge must take into consideration for the purpose of applying the extinguishing limitation. The existence

---

<sup>236</sup>In case of the ECtHR: Cyprus v. Turkey, p. 2: “(...) the Court acknowledged (...) the obligation (...) in an inter-State dispute to act without delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State (...)”.

of damage caused by the delay places the defendant in a disadvantageous situation since this compromises his ability to defend himself and undermines the principle of “equality of arms” in the trial<sup>237</sup>.

### **Concluding remarks**

Silence does not produce juridical effects: *qui tacet neque negat neque utique fatetur*. The notion of action-reaction constitutes a legal fact of an exclusive nature which relates a previous active conduct.

The silence of the States qualifies as both a legal act and a legal fact. This means that the international legal order brings the production of juridical effects back to a voluntary silence rather than to a silence devoid of any subjective connotation. Silence in itself materializes an institution of law called acquiescence where silence is grafted onto a different institution of international law, obviously l'estoppel by silence or the extinctive prescription.

Silence both as a legal act and as a legal fact must satisfy certain requirements in order to produce legal effects. The requirements of silence as a legal act are concerned with ensuring that the

---

<sup>237</sup>Canfor Corporation: “(...) [l]aches is an equitable defense asserted to bar the adjudication of stale claims. The doctrine is premised on the theory that a claim that is plagued with undue delay prejudices defendant because evidence is no longer available to defend against the claim (...)”, par. 165.

reaction exists or can be maintained by the will of the State. The legal effects meet a minimum denominator in the knowledge or the existence of an interest in acting and in the passage of a significant period of time. Silence as a legal fact is aimed at protecting the position of the State which had legitimately relied on the silence of others. These requirements coincide with the elements that make up the institutions of the estoppel by silence or the extinguishing prescription, i.e. the good faith that a State acts by verifying a prejudice against the passage for a significant period of time. Silence thus produces legal effects only in the presence of a subjective or objective requirement. The passage of a significant period of time represents a real requirement and consolidates the presumption that the subjective and objective requirement are satisfied.

The nature of the legal effects are produced by the silence of the States and changes when the latter integrate a legal act and produce the related material effects that affect the existence of a right; or when produce procedural effects affecting the existence of the right to assert a claim before a judicial body. Acquisitive prescription involves the transfer of sovereign rights. The estoppel by silence limits itself to preventing the State for a long period of time from protesting the exercise of *de facto* sovereign powers on its territory and from adopting a contradictory conduct. The tacit renunciation invokes the international

responsibility of a State which entails the loss of the right that has been violated and the extinguishing prescription conditions to enforce this right in court.

Silence in international law as the unjustified absence of a reaction to the conduct of others produces juridical effects subordinate to the knowledge or knowability of the conduct of others, above all to the existence of an interest in acting and to the passage of a significant period of time where the silence of the State generates acquiescence (juridical act) and produces material effects. The production of legal effects to the good faith of the State acts in the occurrence of damages due to the contradictory conduct of others and the passage of a significant period of time, where the silence of the State is grafted on the institution of the estoppel by silence or the prescription extinguishing (legal fact) which produces procedural effects. The production of legal effects is attributable to the real or presumed will of the State which does not react. It is due to the need to protect the legitimate expectation of the acting State (estoppel by silence) or the satisfaction of the needs of the system of certainty and the stability of legal relationships (extinctive prescription).

Ultimately, the most effective solution to the elimination of any doubts or different interpretations raised by the silence, and in particular where it concerns the use of armed force, would be

the constant vigilance of the Security Council, which will take charge of all cases of the use of force even and beyond the ones we mentioned in previous paragraphs, judging each time in an explicit manner whether he will condemn it or accept it. Such a thing seems difficult, even utopian, if we naturally consider the number of cases that are constantly increasing, as well as the State that has chosen the middle path, refusing to take a clear position and declare it and as a consequence “tolerating” the use of force of another State.

It is a kind of “special” responsibility that definitely falls under the international responsibility of States. A responsibility that falls, for better or worse, on the very States that decide to remain silent. A State, which is interested in the existing law of the use of force, but also in that which may, in time, be developed, must consider the possible consequences that will result from a choice to observe a silent attitude. Of course, silence does not mean consent to the use of force, each of them must take a clear position in the battle between the claims (of a State) and the reactions to come. Only in this way, it will be possible to preserve the legal content of a rule, so important for the common interest and good, which is the prohibition of the use of armed force and the general protection of the individual, as well as the evolution of international law.

## References

- Abi-Saab, H., Keith, K., Marleau, G., Marquet, C. (2019). *Evolutionary interpretation and international law*. Hart Publishing, Oxford & Oregon, Portland.
- Adoua-Mbonga, A.S. (2021). L'accord tacite en droit international. *Annale des Sciences Juridiques et Politiques*, 21.
- Ajibola, B. (1998). Dispute resolution by the International Court of Justice. *Leiden Journal of International Law*, 21, 124ss.
- Alland, D. (2021). *Manuel de droit international public*. PUF, Paris.
- Alvarez-Jiménez, A. (2011). Methods for the identification of customary international law in the International Court of Justice's jurisprudence 2000-2009. *The International & Comparative Law Quarterly*, 2011, 684ss.
- Antunes, N.S.M. (2006). Acquiescence. *Max Planck Encyclopedia of International Law*, para. 2.
- Arangio-Ruiz, G. (2007). Customary law: A few more thoughts about the theory of "spontaneous" international custom. In O. Corten (ed.), *Droit du pouvoir, pouvoir du droit. Milanges offerts à Jean Salmon*. ed. Bruylant, Bruxelles.
- Aust, A. (2007). *Modern treaty law and practice*. Cambridge University Press, Cambridge.
- Austin, J. L. (1976). *How to do things with words*. Oxford University Press, Oxford.

Bailey, S.D., Daws, S. (1998). *The procedure of the Security Council*. Oxford University Press, Oxford, 1998, 316ss.

Baker, S. (2014). Germany v. United States in the International Court of Justice. An international battle over the interpretation of article thirty-six of the Vienna Convention on consular relations and provisionals measures orders. *Georgia Journal of International & Comparative Law*, 30, 282ss.

Barale, J. (1965). L'acquiescement dans la jurisprudence internationale. *Annuaire Français de Droit International*, 11, 389-391, 427ss.

Basdevant, J. (1936). *Efficacité des règles générales du droit de la paix*. Recueil des cours, Brill-Nijhoff, Leiden, Boston, vol. 58

Batson, A. (2022). Acquisitive prescription in early modern international law. *Journal of the History of International Law*, 24.

Beckett, W.E. (1934). *Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la CPJI*. Recueil des cours, Brill-Nijhoff, Leiden, Boston, vol. 50.

Bederman, J. (2010). Acquiescence, objection and the death of customary law. *Duke Journal of International & Comparative Law*, 21, 31, 46ss.

Bentz, J. (1963). Le silence comme manifestation de volonté en droit international public. *Revue Générale de Droit International Public*, 34, 44, 92ss.

Bianchi, A. (2017). Choice and (the awareness of) its consequences: ICJ's "structural bias" strikes again in the Marshall Islands case. *American Journal of International Law Unbound*, 86.

Blum, Y.Z. (1965). *Historic titles in international law*. Springer, The Hague.

Boisson De Chazournes, L. (2013). Subsequent practice, practices and "family resemblance": Towards embedding subsequent practice in its operative milieu. In G. Nolte (ed.), *Treaties and subsequent practice*. Oxford University Press, Oxford.

Borchard, E.M. (1915). *The diplomatic protection of citizens abroad or the law of international claims*. Banks Law Publishing, London.

Bos, M. (1980). Theory and practice of treaty interpretation. *Netherlands International Law Review*, 57, 36ss.

Bos, M. (1982). The identification of custom in international law. *German Yearbook of International Law*, 25, 10, 54ss.

Bower, G.S. (1923). *The law relating to estoppel by representation*. Butterworths, London.

Bowett, D.W. (1957). Estoppel before international tribunals and its relation to acquiescence. *British Yearbook of International Law*, 33, 176, 204ss.

- Bradley, C., Gulati, G. (2010). Withdrawing from international law. *Yale Law Journal*, 120, 203, 276ss.
- Bradley, C.A., Gulati, M. (2010). Withdrawing from international custom. *Yale Law Journal*, 120, 204.
- Briggs, H.W. (1985). Nicaragua v. United States: Jurisdiction and admissibility. *American Journal of International Law*, 79, 374, 378ss.
- Brown, C. (1966). A comparative and critical assessment of estoppel in international law. *University of Miami Law Review*, 50, 370, 414ss.
- Brownlie, I. (2019). *Principles of public international law*. Oxford University Press, Oxford.
- Buga, I. (2018). *Modification of treaties by subsequent practice*. Oxford University Press, Oxford, 2018.
- Butchard, P.M. (2020). *The responsibility to protect and the failures of the United Nations Security Council*. Hart Publishing, Oxford & Oregon, Portland.
- Butcher, J. (2013). The International Court of Justice and the territorial dispute between Indonesia and Malaysia in the Sulawesi sea. *Contemporary Southeast Asia. Journal of International and Strategic Affairs*, 35 (2), 240ss.
- Byers, M. (1997). Conceptualising the relationship between jus cogens and erga omnes rules. *Nordic Journal of International Law*, 66 (2/3), 212ss.

- Byers, M. (2018). The intervention in Afghanistan-2001. In A. Hofer, T. Ruys, O., Corten, *The use of force in international law: A case-based approach*. Oxford University Press, Oxford, 628ss.
- Cahier, PH. (1968). Le comportement des États comme source de droits et d'obligations. In *Recueil d'études de droit international en hommage à Paul Guggenheim*. Ginevra, Institut universitaire de Hautes Etudes internationales.
- Cançado Trindade, A.A. (2020). *International law for humankind towards a new jus gentium*. ed. Brill, Bruxelles.
- Cardiel, L.J.L.A., Davis, A. Macherel, L. (2018). Modern self-defence in practice: Two case scenarios. *Columbia Human Rights Law Review*, 50, 17ss
- Carreau, D. (2018). *Droit international public*. LGDJ, Paris, 600ss.
- Chan, K.C. (2018). The ICJ's judgement in Somalia v. Kenya and its implications for the law of the sea. *Utrecht Journal of International and European Law*, 34 (2), 200ss.
- Chan, PH. (2004). Acquiescence/estoppel in international boundaries: Temple of Preah Vihear revisited. *Chinese Journal of International Law*, 3, 422, 431-432, 442ss.
- Chandrasekhara Rao, P., Gautier, P. (2018). *The international tribunal for the law of the sea: Law, practice and procedure*. Edward Elgar Publishers, Cheltenham.

Chang-Tung, L., Garcia, T. (2019). *La Convention de Vienne sur le droit des traités. Bilan et perspectives 50 ans après son adoption*. Pedone, Paris.

Chantal Ribeiro, M., Loureiro Bastos, D., Henriksen, T. (2020). *Global challenges and the law of the sea*. ed. Springer, Berlin.

Chapaux, V. (2011). Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties. In O. Corten, P. Klein (eds.). *The Vienna Convention on the Law of Treaties. A commentary*. Oxford University Press, Oxford.

Cheng, B. (2006). *General principles of law as applied by international courts and tribunals*. Cambridge University Press, Cambridge.

Christie, D.R. (1983). From the shoals of Ras Kaboudia. The Tunisia v. Libya continental shelf boredom delimitation. *Georgia Journal of International & Comparative Law*, 13.

Ciorciari, J.D. (2014). Request for interpretation of the judgment of 15 June 1962 in the Temple of Preah Vihear case (Cambodia v. Thailand). *American Journal of International Law*, 108 (2), 290ss.

Combacau, J., Sur, S. (2019). *Droit international public*. LGDJ, Paris.

Corten, O. (2006). The controversies over the customary prohibition on the use of force: A methodological debate. *The European Journal of International Law*, 16 (5), 803-822.

Corten, O., Klein, P. (2012). The limits of complicity as a ground for responsibility. Lessons learned from the Corfu channel case. In K. Bannelier, T. Christakis, S. Heathcote, *The ICJ and the evolution of international law. The enduring impact of the Corfu channel case*. ed. Routledge, London & New York, 316ss.

Corten, O., Klein, P. (eds.) (2011). *The Vienna Convention on the Law of Treaties. A commentary*. Oxford University Press, Oxford.

Costelloe, D. (2017). *Legal consequences of peremptory norms in international law*. Cambridge University Press, Cambridge, 2017, 47ss.

Cot, J.P. (1966). La conduite subséquente des parties à un traité. *Revue Générale de Droit International Public*, 37, 632, 668ss.

Cottier, T. (2015). *Equitable principles of maritime boundary delimitation*. Cambridge University Press, Cambridge.

Cottier, T., Müller, J.P. (2007). Estoppel. *Max Planck Encyclopedia of Public International Law*.

Crawford, J. (2012). *Brownlie's principles of public international law*. Oxford University Press, Oxford, 34.

Crawford, J. (2013). *Chance, order, change: The course of international law*. Recueil des cours, Brill-Nijhoff, Leiden, Boston, vol. 365.

- D'Amato, A. (1969). Consent, estoppel and reasonableness: Three challenges to universal international law. *Virginia Journal of International Law* 10, 7ss.
- D'Amato, A. (1971). *The concept of custom in international law*. Cornell University Press, Chicago.
- D'Aspremont, J. (2008). Softness in international law: A self-serving quest for new law material. *European Journal of International Law*, 19, 1076, 1094ss.
- Danilenko, G. (1988). The theory of international customary law. *German Yearbook of International Law*, 35, 10, 48.
- Dargent, J. (1943). *Une théorie originale du droit anglais en matière de preuve: la doctrine de l'estoppel*. Tourcoing, Imp. G. Frère, Grenoble.
- Das, H. (1997). Estoppel et l'acquiescement. Assimilations pragmatiques et divergences conceptuelles. *Revue Belge de Droit International*, 20, 610, 634ss.
- DAS, O. (2013). *Environmental protection security and armed conflict: A sustainable development perspective*. Edward Elgar Publishing, Cheltenham, 188ss.
- Dauenhauer, B.P. (1980). *Silence. The phenomenon and its ontological significance*. Indiana University Press.
- De La Sablière, J.M. (2018). *Le Conseil de Sécurité des Nations Unies*. Larcier, Bruxelles.

- De Louter, J. (1920). *Le droit international public positif*. Oxford University Press, Oxford.
- De Martens, F. (1883). *Traité de droit international*. Librairie Marescq Ainé, Paris.
- De Vattel, E. (1916). *Droit des gens*. Vol. II, Washington (D.C.), Washington Carnegie Institution.
- De Visscher, CH. (1967). *Les effectivités du droit international public*. Pedone, Paris.
- Dekker, I.F., Werner, W.G. (2014). *Governance and international legal theory*. ed. Springer, Berlin.
- Di Stefano, G. (2019). *Fundamentals of public international law. A sketch of the international legal order*, ed. Brill, Bruxelles.
- Di Stefano, G., Henry, D. (2012). The ICJ and the Security Council. Disentangling themis and ares. In K. Bannelier, TH. Christakis, S. Heathcote, *The International Court of Justice and the evolution of international law. The enduring impact of the Corfû Channel case*. ed. Routledge, London & New York, 60ss.
- Dinstein, Y. (2011). *War, aggression and self-defence*. Cambridge University Press, Cambridge, 322ss.
- Distefano, G. (1994). La practice subséquente des États Parties à un traité. *Annuaire Français de Droit International*, 40, 42, 72.
- Dominicé, Ch. (1986). A propos du principe de l'estoppel en droit de gens. In *Recueil d'études de droit international en*

*homage à Paul Guggenheim.* Geneve, Institut universitaire de Hautes Itudes internationales.

Dörr, O. (2018). Article 31. General rule of interpretation. In O. Dörr, K. Schmalenbach (eds.). *Vienna Convention on the Law of Treaties. A commentary.* Springer, Heidelberg-New York, 536ss.

Dörr, O., Schmalenbach, K. (eds.). (2018). *Vienna Convention on the Law of Treaties. A commentary.* Springer, Heidelberg-New York.

Drahozal, C.R., Gibson, C.S. (2007). *The Iran-US claims tribunal at 25.* Oxford University Press, Oxford.

Duxbury, N, (2016). Acquisitive prescription and fundamental rights. *University of Toronto Law Journal*, 64 (4), 478ss.

Eckart, E. (2012). *Promises of States under international law.* Hart Publishing, Oxford & Oregon, Portland.

Fauchille, P. (1925). *Traité de droit international public.* Vol. I, Rousseau & Co., Paris, 385ss.

Fenwick, C.G. (1924). The distinction between legal and political questions. *Proceedings of the American Society of International Law*, 18, 47ss.

Fitzmaurice, G. (1953). The law and procedure of the International Court of Justice, 1951-1954: General principles and sources of law. *British Yearbook of International Law*, 30, 2, 30, 70ss.

Fitzmaurice, M. (2005). Consent to be bound-anything new under the sun?. *Nordic Journal of International Law*, 74,. 484, 511ss.

Fitzmaurice, M., Merkouris, P. (2020). *Treaties in motion. The evolution of treaties from formation to termination*. Cambridge University Press, Cambridge, 282ss.

Franck, T.M. (2001). When, if ever, may States deploy military force without prior Security Council authoriastion?. *Washington University Journal of Law and Policy* 5 (1), 64ss.

Freestone, D., Barnes, R., Ong, D. (2006). *The law of the sea, progress and progress*. Oxford University Press, Oxford, 420ss.

Galbraith, J. (2019). Contemporary practice of the United States relating to international law. *American Journal of International Law*, 113, 134ss.

García García-Revilla, M. (2015). *The contentious and advisory jurisdiction of the international tribunal for the law of the sea*. Martinus Nijhoff, Leiden, London.

Gardam, J. (2001). The contribution of the International Court of Justice to international humanitarian law. *Leiden Journal of International Law*, 14, 350ss.

Garwood-Gowers, A., Buys, E. (2018). The (ir)relevance of human suffering: Humanitarian intervention and Saudi Arabia's operation decisive storm in Yemen. *Journal of Conflict and Security Law*, 24 (1), 22ss.

Gauthier, PH., (1995). Le plateau continental de la Belgique et sa délimitation. *Revue Belge de Droit International*, 28, 110, 124

Giegerich, T. (2010). Treaties, multilateral, reservations to. *Max Planck Encyclopedia of Public International Law*.

Giganti, A. (1969). The effect of unilateral State acts in international law. *New York University Journal of International Law & Policy*, 2, 334, 365ss.

Gioia, A. (2013). Historic titles. *Max Planck Encyclopedia of Public International Law*.

Glennon, M.J. (2005). How international rules die. *Georgetown Law Journal*, 93, 940 992ss.

Gordon, G. (2009). The oil platforms opinion: An elephant in the eye of a needle. *Amsterdam Law Forum*, 1 (2).

Gourgourinis, A. (2011). The distinction between interpretation and application of norms in international adjudication. *Journal of International Dispute Settlement*, 2 (1), 34ss.

Gouveinhes, F. (2012). Retour sur un clasique: le plaidioiries de Paul Reuter dans l'affaire du Temple de Prèah Vichear (Cambodge v. Thailand). *Revue Gènèrale de Droit International Public*, 116 (2), 468ss.

Gozie Ogbodo, S. An overview of the challenges facing the International Court of Justice in the 21<sup>st</sup> century. *Annual Survey of International & Comparative Law*, 16.

- Gray, C. (2018). *International law and the use of force*. Oxford University Press, Oxford, 12.
- Green, J.A. (2016). *The persistent objector rule in international law*. Oxford University Press, Oxford.
- Greig, D.W. (1992). Nicaragua and the United States: Confrontation over the jurisdiction of the international court. *British Yearbook of International Law*, 62, 121, 284ss
- Gross, L. (1980). The case concerning United States diplomatic and consular staff in Tehran. Phase of provisional measures. *American Journal of International Law*, 74, 396ss.
- Guliyev, K. (2017). Local custom in international law. Something in between general custom and treaty. *International Community Law Review*, 19, 48, 69ss.
- Hakapää, K. (2013). Negotiation. *Max Planck Encyclopedia of Public International Law*.
- Hakimi, M. (2015). Defensive force against non-State actors: The State of play. *International Law Studies*, 91 (1), 14ss.
- Hall, W.E. (1924). *Treatise on international law*. Oxford University Press, Oxford.
- Harrison, J. (2018). The political question doctrines. *American University Law Review*, 67 (2), 460ss.
- Hartzenbusch, C.A. (1993). Land, island and maritime frontier dispute (El Salvador/Honduras). *Harvard International Law Journal*, 34, 242ss.

- Heinlein, P.A. (2010). The United States and German interpretations of the Vienna Convention on consular relations. Is any constitutional court really cosmopolitan?. *Maryland Journal of International Law*, 25, 321ss.
- Helfer, L.R., Wuerth, I.B. (2016). *Customary international law. An instrument choice perspective*. *Michigan Journal of International Law*, 37 (4), 580ss.
- Helgeson, E., Lauterpacht, E. (2000). *Iran-US claim tribunal*. Cambridge University Press, Cambridge.
- Henry, E. (2017). Alleged acquiescence of the international community to revisionist claims of international customary law (with special reference to the “jus contra bellum” regime). *Melbourne Journal of International Law* 18 (2), 12ss.
- Hernandez, G. (2014). *The International Court of Justice and the judicial function*. Oxford University Press, Oxford, 78ss.
- Higgins, R. (1993). *International law and the avoidance, containment and resolution of disputes*. Recueil des Cours, Brill-Nijhoff, Leiden, Boston, vol. 230.
- Higgins, R. (1997). Time and the law: International perspectives on an old problem. *International & Comparative Law Quarterly*, 46, 502, 522
- Hollis, D.B. (2020). *The oxford guide to treaties*. Oxford University Press, Oxford.

- Horn, F. (1988). *Reservations and interpretative declarations to multilateral treaties*. North-Holland, Amsterdam.
- Hovell, D. (2016). *The power of process. The value of due process in Security Council*. Oxford University Press, Oxford.
- Hudson, M. (1943). *The Permanent Court of International Justice, 1920-1924: A Treatise*. MacMillan, New York.
- Ibrahim, A.R. (1992). The doctrine of laches in international law. *Virginia Law Review*, 83, 648, 694.
- Islam, R., Muquim, N. (2020). The Gambia v Myanmar at the ICJ: Good samaritans testing State responsibility for atrocities on the Rohingya. *California Western International Law Journal*, 51 (4), 79ss.
- Jackson, M. (2015). *Complicity in international law*. Oxford University Press, Oxford.
- Jacqui, J. P. (1991). *Acte et norme en droit international public*. Recueil des cours, Brill-Nijhoff, Leiden, Boston, vol. 227.
- Jayakumar, S., Koh, T., Yee, L. Pedra Branka: Story of the unheard cases, Straits Times Press, Singapore, 2020.
- Jennings, R. (1963). *The acquisition of territory in international law*. Manchester University Press, Manchester.
- Jessup, P.C. (1928). The Palmas island arbitration. *American Journal of International Law*, 22, 736ss.
- Jeutner, V. (2017). *Irresolvable norme conflicts in international law. The concept of a legal dilemma*. Oxford University Press,

Oxford.

Jimenez De Arichaga, E. (1978). *International law in the past third of a century*. Recueil des cours, Brill-Nijhoff, Leiden, Boston, vol. 159.

Johnson, D. H. (1955). Consolidation as a root of title in international law. *Cambridge Law Journal*, 13, 214, 229ss.

Johnson, D.H. (1950). Acquisitive prescription in international law. *British Yearbook of International Law*, 27, 334, 356.

Kaczorowska-Ireland, I. (2015). *Public international law*. ed. Routledge, London & New York.

Kaijun, P. (2017). A re-examination of estoppel in international jurisprudence. *Chinese Journal of International Law*, 16 (4).

Kamto, M. (2011). Article 9: Adoption of the text. In O. Corten, P. Klein (eds.). *The Vienna Convention on the law of treaties. A commentary*. Oxford University Press, Oxford.

Kassoti, E. (2015). *The juridical nature of unilateral acts in international law*. Brill-Nijhoff, Leiden, Boston.

Kelly, G.M. (1963). The temple case in historical perspective. *British Yearbook of International Law*, 39, 464, 477ss.

Kelsen, H. (1966). *Principles of international law*. 2a ed., Holt, Rinehart and Winston, New York.

King, B.E. (1934). Prescription of claims in international law. *British Yearbook of International Law*, 15, 84, 99.

- Kirby, J., Hodgson, A. (2022). The Gambia v. Myanmar at the International Court of Justice: A search for national and international values. *The Round Table. The Commonwealth Journal of International Affairs*, 111 (2), 200ss.
- Kirgis, F.L. (2001). Israel's intensified military campaign against terrorism. *American Society of International Law*, 6 (19).
- Klabbers, J. (2006). Treaties, conclusion and entry into force. *Max Planck Encyclopedia of Public International Law*, par. 2.
- Klein, N., Parlett, K. (2022). *Judging the law of the sea*. Oxford University Press, Oxford.
- Kohen, K., Heathcote, S. (2011). Article 45: Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. In O. Corten, P. Klein (eds.). *The Vienna Convention on the Law of Treaties. A Commentary*. Vol. II, Oxford University Press, Oxford.
- Kohen, M.G. (2003). The use of force by the United States after the end of the cold war, and its impact on international law. In M. Byers, G. Nolte (eds). *United States hegemony and the foundations of international law*. Cambridge University Press, Cambridge, 2003, p. 224.
- Kolb, A.S. (2018). *The United Nations Security Council members' responsibility to protect. A legal analysis*. Springer, Berlin.

- Kolb, R. (2014). *The International Court of Justice*. Hart Publishing, Oxford & Oregon, Portland.
- Kolb, R. (2016). *The law of treaties: An introduction*. Edward Elgar Publishers, Cheltenham.
- Kolb, R. (2017). *Good faith in international law*. Hart Publishing, Oxford, Oregon, Portland.
- König, D. (2013). Tacit consent/opting out procedure. *Max Planck Encyclopedia of Public International Law*, par. 3.
- Kopela, S. (2010). The legal value of silence as State conduct in the jurisprudence of international tribunals. *Australian Yearbook of International Law*, 29 (1), 90ss.
- Korhonen, O. (1996). New international law. Silence, defence or deliverance?. *European Journal of International Law*, 7 (1), 11-12.
- Koskenniemi, M., (2005). *From apology to utopia: The structure of the international legal argument*. Cambridge University Press, Cambridge.
- Kreß, C. (2019, October 14). *A collective failure to prevent Turkey's operation "Peace Spring" and NATO's silence on international law*. <https://www.ejiltalk.org/>
- Lasswell, H., McDougal, M. (1992). *Jurisprudence for a free society: Studies in law, science and policy*. Martinus Nijhoff Publishers, Dordrecht, London, Boston.

- Latty, F., (2010). Actions and omissions. In J. Crawford, A. Pellet, S. Olleson (eds.). *The law of international responsibility*. Oxford University Press, Oxford.
- Lauterpacht, H. (1950). Sovereignty over submarine areas. *British Yearbook of International Law*, 27, 379, 435.
- Lauterpacht, H. (1970). *Private law sources and analogies of international law*. Archon, Handem.
- Lauterpacht, H. (1982). *The development of international law by the international court*. Cambridge University Press, Cambridge.
- Lauterpacht, H. (2011). *The function of law in the international community*. Oxford University Press, Oxford.
- Lawrence, T.J. (1923). *The principles of international law*. Heath & Co., London.
- Le Floch G. (edir.). (2018). *Les 20 ans du tribunal international du droit de la mer*. ed. Pedone, Paris, 146ss.
- Lesaffer, R. (2005). Argument from roman law to international law: Occupation and acquisitive prescription. *European Journal of International Law*, 16, 27, 59.
- Lewis, D.A., Modirzadeh, N.K., Blum, G. (2019). *Quantum of silence: Inaction and jus ad bellum*. Harvard Law School, Program on International Law and Armed Conflict.
- Liakopoulos, D. (2020a). *Complicity in international law*. W.B. Sheridan Law Books, ed. Academica Press, Washington,

London.

Liakopoulos, D. (2020b). *International organizations and legal sanctions against governments*. W.B. Sheridan Law Books, ed. Academica Press, Washington, London.

Liakopoulos, D. (2020c). *The role of not party in the trial before the International Court of Justice*. ed. Maklu, Antwerp, Portland

Liakopoulos, D. (2021). Jurisprudential and jurisdictional aspects applicable norms and decisions of the arbitral Tribunals of the law of the sea. *Revista Electrónica Cordobesa de Derecho Internacional Público*, vol. 1, 28ss.

Liebllich, E. (2021). The humanization of jus ad bellum. Prospects and perils. *European Journal of International Law*, 32 (2), 584ss.

Linderfalk, U. (2020). *Understanding jus cogens in international law and international legal discourse*. Edward Elgar Publishers, Cheltenham.

Lindley, F. (1926). *The acquisition and government of backward territory in international law*. Longmans, London.

Lis, E. (2016). The principle of good faith in the international law. *Studia Juridica Lublinensia*, 25 (1).

Lucak, N. (2012). Georgia v. Russia Federation. A question of the jurisdiction of the International Court of Justice. *Maryland Journal of International Law*, 27, 328ss.

Lucht, S. (2011). *Der Internationale Gerichtshof: zwischen Recht und Politik*. Herbert Utz Verlag, München.

Macgibbon, I. (1953). Some observations on the part of protest in international law. *British Yearbook of International Law*, 30, 296, 322ss.

Macgibbon, I. (1954). The scope of acquiescence in international law. *British Yearbook of International Law*, 31, p. 144.

Macgibbon, I. (1957). Customary international law and acquiescence. *British Yearbook of International Law*, 33, 118, 148.

Macgibbon, I. (1958). Estoppel in international law. *International & Comparative Law Quarterly*, 7, 469, 516ss.

Magnùsson, B.M. (2015). *The continental shelf beyond 200 nautical miles*. ed. Brill & Martinus Nijhoff Publishers, Bruxelles, The Hague, 135ss.

Maira, H.A. (2010). Legitimate expectations and informal administrative representations. In S.W. Schill (ed.), *International investment law and comparative public law*. Oxford University Press, Oxford.

Mann, F.A. (1998). Reflections on the prosecution of persons abducted in breach of international. In Y. Dinstein (ed.), *International law at a time of perplexity*. Martinus Nijhoff Publishers, Dordrecht, London.

Marie, A. (2018). *Le silence de l'État comme manifestation de sa volonté*. Pedone, Paris.

Martin, A. (1979). *L'estoppel en droit international public: précède d'un aperçu de la théorie de l'estoppel en droit anglais*. Pedone, Paris.

Mayr, T.F., Singer, J.M. (2016). Keep the wheels spinning. The contributions of advisory opinions of the International Court of Justice to the development of international law. *Zeitschrift für ausländisches Recht und Völkerrecht*, 76, 426ss.

Mcdougal, M., Schlelei, N.A. (1955). The hydrogen bomb test in perspective: Lawful measures for security. *Yale Journal of International Law*, 64, 649, 712ss.

Mcfadden, D., Train, K. (2017). Contingent valuation of environmental goods: A comprehensive critique. *Edward Elgar Publishing, Cheltenham*, 147ss.

Mcnaair, A.D. (1924). The legality of the occupation of the Ruhr. *British Yearbook of International Law*, 5, 18, 39.

Meijers, H. (1978). How is international law made? The stages of growth of international law and the use of its customary rules. *Netherlands Yearbook of International Law*, 9 (3), 28ss.

Mendelson, H. (1998). *The formation of customary international law*. Recueil des cours, Brill-Nijhoff, Leiden, Boston, vol. 272, 190ss.

- Mendelson, M.H. (1991). State acts and omissions as explicit or implicit claims. In A.A.V.V. *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally*. ed. Pedone, Paris, 374ss.
- Merkouris, P. Kammerhofer, J. Arajärvi N. (2022). *The theory, practice and interpretation of customary international law*. Cambridge University Press, Cambridge.
- Merrills, J.G. (1995). Interim measures of protection in the recent jurisprudence of the International Court of Justice. *International and Comparative Law Quarterly*, 44, 128ss.
- Miles, C.A. (2017). *Provisional measures before international courts and tribunals*. Cambridge University Press, Cambridge.
- Mofidi, M. (1998). Prudential timorousness in the case concerning East Timor (Portugal v. Australia). *Detroit College of Law Journal of International Law and Practice*, 7, 36ss.
- Moore, J.B. (1898). *History and digest of international arbitrations to which the United States has been a party*. Voll. II/III, 6a ed., Government Printing Office, Washington (DC).
- Mossop, J. (2016). *The continental shelf beyond 200 nautical miles. Rights and responsibility*. Oxford University Press, Oxford.
- Müller, D. (2011). Article 20: Acceptance of and objections to reservations. In O. Corten, P. Klein (eds.). *The Vienna Convention on the Law of Treaties. A commentary*. Oxford

University Press, Oxford.

Müller, J.P., Cottier, T. (2007). Estoppel. *Max Planck Encyclopedia of International Law*, para. 1

Müllerson, R. (1998). The interplay of objective and subjective elements in customary law. In K. Wellens (ed.). *International law: Theory and practice. Essays in honour of Eric Suy*. Martinus Nijhoff Publishers, Dordrecht, London, Boston.

Nègulesco, D. (1936). *The evolution of the consultative services of the permanent Court of international justice*. Recueil des cours, ed. Brill, Bruxelles, vol. 57, 20ss.

Ngobeni, L. (2012). Barcelona Traction and Nottebohm revisited. Nationality as a requirement for diplomatic protection of shareholders in South Africa law: Notes and comments. *Yearbook of International Law*, 37, 172ss.

Nolte, G. (2013). *Treaties and subsequent practice*. Oxford University Press, Oxford, 210, 301.

Nußberger, B., Kreß, C. (2018). The Entebbe Raid-1976. In A. Hofer, T. Ruys, O., Corten, *The use of force in international law: A case-based approach*. Oxford University Press, Oxford, 222ss.

O'Connell, D.P. (1970). *International Law*, 2a ed., Stevens & Sons, London.

O'Connell, M.E. (2002). American exceptionalism and the international law of self-defense. *Denver Journal of*

*International Law and Policy*, 31 (1), 50ss.

Oraison, A. (2000). Quelques réflexions générales sur les opinions séparées individuelles et dissidentes des juges de la Cour internationale de Justice. *Revue de Droit International, de Sciences Diplomatiques et Politiques*, 78, 168ss.

Orakhelashvili, A. (2006). *Peremptory norms in international law*. Oxford University Press, Oxford.

Orakhelashvili, A. (2015). Changing jus cogens through State practice? The case of the prohibition of the use of force and its exceptions. In M. Weller, *The Oxford handbook of the use of force in international law*. Oxford University Press, Oxford, 160ss.

Ortolan E. (1851). *Des moyens d'acquérir le domaine international*. Hachette, Vanves.

Oude Elferink, AG. (2014). *The delimitation of the continental shelf between Denmark, Germany and the Netherlands*, Cambridge University Press, Cambridge.

Ovchar, A. (2009). Estoppel in the jurisprudence of the International Court of Justice. A principle promoting stability threatens to undermine it. *Bond Law Review*, 21 (1), 34ss.

Paul, J. (1980). International adjudication, embassy seizure. United States v. Iran. *Harvard Journal of International Law*, 21, 270ss.

- Peat, I. (2019). *Comparative reasoning in international courts and tribunals*. Cambridge University Press, Cambridge.
- Pecourt García, E. (1962). El principio del estoppel en derecho internacional público. *Revista Española de Derecho Internacional*, 15, 99, 142ss.
- Pellet, A. (2014). *The charter of the UN. A commentary*. Oxford University Press, Oxford.
- Pellet, A. (2018). Les raisons du développement du soft law en droit international: choix ou nécessité?. In P. Deumier, J.M. Sorel, (sous la direction de). *Regards croisés sur la soft law en droit interne, européen et international*. LGDJ, Paris, 177-192.
- Perels, F. (1884). *Manuel de droit maritime international*. Librairie Guillaumin & Co., Paris.
- Phillimore, R. (1879). *Commentaries upon international law*. Vol. I, Butterworths, London.
- Pigrau Solè, A. (2018). El caso de las Islas Marshall: Colonialismo, armas nucleares y justicia ambiental. *Anuario Español de Derecho Internacional*, 34, 444ss.
- Pinto, R. (1995). *La prescription en droit international*. Recueil des cours, ed. Brill, Nijhoff, Leiden, Boston, vol. 87.
- Plender, R. (1987). The role of consent in the termination of treaties. *British Yearbook of International Law*, 57, 135, 169.
- Pollock, F. (1904). *The expansion of the common law*. Stevens & Sons, London.

Pratap, D. (1972). *The advisory jurisdiction of the international Court*. Oxford University Press, Oxford, 15ss.

Quane, H. (2014). Silence in international law. *British Yearbook of International Law*, 84 (1), 244ss.

Ralston, J. H. (1910). Prescription. *American Journal of International Law*, 4, 134, 148ss.

Randelzhofer, A., Nolte, G. (2012). Action with respect to threats to the peace, breaches of the peace, and acts of aggression, Article 51-Chapter VII. In N. Wassendorf, B. Simma, D.E. Khan, G. Nolte (eds.). *The Charter of the United Nations: A commentary*. Oxford University Press, Oxford, 1398ss, par. 2.

Ratner M., Lobel, J. (1999). Bypassing the Security Council: Ambiguous authorizations to use force, cease-fires and the Iraqi inspection regime. *The American Journal of International Law* 93 (1), 130ss.

Reinold, T. (2011). State weakness, irregular warfare, and the tight to self-defense post 9/11. *The American Journal of International Law*, 105 (2), 255ss.

Reisman, M. (1971). *Nullity and revision: The review and enforcement of international judgments and awards*. Yale University Press, New Haven.

Reisman, M., Wiessner, S., Willard, A.R. (2007). The New Haven School: A brief introduction. *Yale Journal of*

*International Law*, 32, 578, 584ss.

Reuter, P. (1961). *Principes de droit international public*. Recueil des cours, ed. Brill, Nijhoff, Leiden, Boston, vol. 103.

Reuter, P. (1968). *Droit international public*. Presses Universitaires de France, Paris, 52ss.

Ridi, N. (2018). Precarious finality? Reflections on res judicata and the question of the delimitation of the continental shelf case. *Leiden Journal of International Law*, 31 (2), 386ss.

Rivier, A. (1896). *Principes du droit des gens*. Rousseau, Paris

Robert, E. (1999). The protection consulaire des nationaux en péril? The ordinances in the conservative terms of renders for the International Court of Justice in the affairs of the Breard (Paraguay v. Etats-Unis) and LaGrad (Allemagne v. Etats-Unis). *Revue Belge de Droit International*, 103, 414ss.

Robertson, A. (2020). Estoppels by silence. In E. Bant, J. Paterson (eds.). *Misleading silence*. Hart Publishing, Oxford & Oregon, Portland, 266ss.

Rodríguez Cedeño, V., Torres Cazorla, M. (2017). Unilateral acts of State in international law. *Max Planck Encyclopedia of Public International Law*.

Rosenne, S. (1985). *The law and the practice of the international court*. ed. Martinus Nijhoff Publishers, Dordrecht, London, Boston.

Ross, A. (1947). *A textbook of international law: General part*. Longmans, London.

Ruda, J.M. (1991). Some of the contributions of the International Court of Justice to the development of international law. *New York University of Journal of International Law & Politics*, 24, 36ss.

Ruys, T. (2008). Quo vadit jus ad bellum? A legal analysis of Turkey's military operations against the PKK in Northern Iraq. *Melbourne Journal of International Law*, 9 (2), 338ss.

Ruys, T., Ferro, L. (2016). Weathering the storm: Legality and legal implications of the saudi-led military intervention in Yemen. *International and Comparative Law Quarterly*, 65 (1), 8ss.

Ruys, T., Ferro, L. (2018). The saudi-led military intervention in Yemen's civil war-2015. In A. Hofer, T. Ruys, O. Corten. *The use of force in international law: A case-based approach*. Oxford University Press, Oxford, 902ss.

Salmon, J. (1974). Le procédé de la fiction en droit international. In Ch. Perelman, P. Foriers (eds.). *Les présomptions et les fictions en droit*. ed. Bruylant, Bruxelles.

Salmond, J. (1913). *Jurisprudence*. Stevens and Haynes, London.

Sands, Ph. (2011). Article 39: General rules regarding the amendment of treaties. In O. Corten, P. Klein (eds.). *The Vienna*

*Convention on the Law of Treaties. A commentary.* Oxford University Press, Oxford.

Scharf, M.P. (2016). How the war against ISIS changed international law. *Case Western Reserve Journal of International Law*, 48 (1), 52ss.

Scharf, M.P., Day, M. (2012). The International Court of Justice's treatment of circumstantial evidence and adverse inferences. *Chicago-Kent Journal of International Law*, 13 (1).

Schreuer, C.H. (2008). What is a legal dispute?. In I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.). *International law between universalism and fragmentation. Festschrift in Honour of Gerard Hafner*. Martinus Nijhoff Publishers, Dordrecht, London, Boston.

Schwarzenberg, G. (1955). *The fundamental principles of international law*. Recueil des cours, ed. Brill, Nijhoff, Leiden, Boston, vol. 87.

Schwarzenberg, G. (1967). *A manual of international law*. Stevens & Sons, London.

Schweiger, E. (2018). Listen closely: What silence can tell us about legal knowledge production. *London Review of International Law*, 6 (3), 392ss.

Sereni, A.P. (1964). Les opinions individuelles et dissidentes des juges des tribunaux internationaux. *Revue Générale de Droit International Public*, 68, 819ss.

- Shaw, M.N. (2017). *International law*. Cambridge University Press, Cambridge, 55ss.
- Shearer, I.A. (2007). *Starke's international law*. Oxford University Press, Oxford.
- Shirlow, E., Gore, K.N. (2022). *The Vienna Convention on the law of treaties in investor-State disputes. History, evolution and future*. Kluwer Law International, New York.
- Sinclair, I. (1996). Estoppel and acquiescence. In A. Vaughan Lowe, M. Fitzmaurice (eds.), *Fifty years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*. Cambridge University Press, Cambridge.
- Sommerfeld, M.P. (2019). *Staatensouveränität und ius cogens. Eine Untersuchung zu Ursprung und Zukunftsfähigkeit der beiden Konzepte im Völkerrecht*. ed. Springer, Berlin.
- Song, Y. (2021). Acquiescence and its role in the settlement of island disputes: "Silence may also speak", but to what extent?. *Chinese Journal of International Law*, 20 (3), 502ss.
- Sorel, J.M., Bori Eveno, V. (2011). Article 31: General rule of interpretation. In O. Corten, P. Klein (eds.). *The Vienna Convention on the Law of Treaties. A commentary*. Vol. I, Oxford University Press, Oxford.
- Sørensen, M. (1932). La prescription en droit international. *Nordic Journal of International Law*, 3, 148, 172ss.
- Soubeyrol, J. (1972). Forum prorogatum et la Cour

Internationale de Justice. De la procédure contentieuse à la procédure consultative. *Revue Générale de Droit International Public*, 21, 1099ss.

Spencer Bower, G. Turner, A., Feltham, P., Hochberg, D.A., Leech, T. (2004). *The law relating to estoppel by representation*. Lexis Nexis, London.

Starski, P. (2016). Silence within the process of normative change and evolution on the use of force-normative volatility and legislative responsibility. *Max Planck International Law Research Paper Series*, 10.

Stern, B. (2001). Custom at the heart of international law. *Duke Journal of Comparative & International Law* 11, 89, 98-100.

Stillmunkes, P. (1964). The "forum prorogatum" devant the permanent court of international justice and the cour internationale de justice. *Revue Générale de Droit International Public*, 13, 656ss.

Sur, S. (2013). *La créativité du droit international*. Recueil des cours de l'Académie de droit international de La Haye, ed. Brill, Bruxelles, vol. 363, 154ss.

Suy, E. (1962). *Les actes juridiques unilatéraux en droit international public*. Librairie générale de droit et de jurisprudence, Paris.

Szazi, E. (2012). *NGOs: Legitimate subjects of international law*. Leiden University Press, Netherlands.

- Szurek, S. (2011). Article 11: Means of expressing consent to be bound by a treaty. In O. Corten, P. Klein (eds.). *The Vienna Convention on the Law of Treaties. A commentary*. Vol. I. Oxford University Press, Oxford.
- Talmon, S. (2015). Determining customary international law. The ICJ's methodology between induction deduction and assertion. *European Journal of International Law*, 26 (2), 419ss.
- Tams, Ch. (2010). Waiver, acquiescence and extinctive prescription. In J. Crawford, A. Pellet, S. Olleson, (eds.). *The law of international responsibility*. Oxford University Press.
- Tassinis, O.C. (2020). Customary in the law. Interpretation from beginning to end. *European Journal of International Law*, 31 (1), 242ss.
- Thirlway, H. (2013). *The law and procedure of the International Court of Justice. Fifty years of jurisprudence*. Vol. I, Oxford University Press, Oxford.
- Thirlway, H.W.A. (2014). *The sources of international law*. Oxford University Press, Oxford, 66ss.
- Thompson, M.P. (1983). From representation to expectation. Estoppel as a cause of action. *The Cambridge Law Journal*, 42 (2), 262ss.
- Tomuschat, C., Walter, C. (2021). *Völkerrecht*. Nomos, Baden-Baden.
- Traviss, A.C. (2012). Temple of Preah Vihear. Lessons on

provisional measures. *Chicago Journal of International Law*, 13, 327ss.

Treves, T. (1999-2000). Conflicts between the International Tribunal for the law of the Sea and the International Court of Justice. *New York University Journal of International Law and Politics*, 32, 810ss.

Treves, T. (2006). Customary international law. *Max Planck Encyclopedia of Public International Law*.

Tunkin, G. (1961). Remarks on the juridical nature of customary norms of international law. *California Law Review*, 49, 421, 433ss.

Vallat, F. (1966). *International law and the practitioner*. Manchester University Press, Manchester.

Verykios, P.A. (1934). *La prescription en droit international public*. Pedone, Paris.

Verzijl, J.H.W. (1973). *International law in historical perspective*. Vol. VI, A.W. Sijthoff, Leiden.

Villalpando, S. (2010). The legal dimension of the international community: How community interests are protected in international law. *European Journal of International Law*, 21 (2), 387ss.

Villiger, M.E. (1997). *Customary international law of treaties: A manual on the theory and practice of the interrelation of sources*. Martinus Nijhoff Publishers, Dordrecht/London/Boston

Villiger, M.E. (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties*. ed. Brill, Martinus Nijhoff Publishers, Leiden, Boston.

Von Mehren, R.B., Kourides, P.N. (1981). International arbitration between states and foreign private parties: The Libyan nationalization cases. *American Journal of International Law*, 75 (3), 478ss.

Wagner, M.L. (1986). Jurisdiction by estoppel in the International Court of Justice. *California Law Review*, 74, 1778, 1807.

Waldock, C.H.M. (1948). Forum prorogatum or acceptance of a unilateral summons to appear before the international Court. *The International and Comparative Law Quarterly*, 2, 378ss.

Waldock, H. (1948). Disputed sovereignty in the Falkland Islands dependencies. *British Yearbook of International Law*, 25, 312 353ss.

Wass, J. (2016). Jurisdiction by estoppel and acquiescence in International Courts and Tribunals. *British Yearbook of International Law*, 86, 157, 198.

Watson, J.R. (1970). Deeds, estoppel by deed, void deeds not given effect by estoppel. *West Virginia Law Review*, 72.

Wedgwood, R. (1998). The enforcement of Security Council Resolution 687: The threat of force against Iraq's weapons of mass destruction. *The American Journal of International Law*,

92 (4), 725ss.

Weller, M. (2017, May 18). *Forcible humanitarian action in international law-Part II*. <https://www.ejiltalk.org/>, p. 2

Westlake, J. (1910). *International law*. Cambridge University Press, Cambridge, 94ss.

Wheaton, H. (1866). *Elements of international law*. Little Brown, Boston.

White, N.D., Cryer, R. (1999). Unilateral enforcement of Resolution 687: A threat too far?. *California Western International Law Journal*, 29, 243, 246.

Witenberg, J.C. (1933). L'estoppel: un aspect du problème des créances américaines. *Journal du Droit International*, 60, 532 539ss.

Wolfke, K. (1993). *Custom in present international law*. Martinus Nijhoff Publishers, Dordrecht, London, Boston.

Wolfrum, R., Pichon, J. (2010). Consensus. *Max Planck Encyclopedia of Public International Law*, par. 3.

Wouters, J., Verhoeven, S. (2008a). Desuetudo. *Max Planck Encyclopedia of Public International Law*, par. 2.

Wouters, J., Verhoeven, S. (2008b). Prescription. *Max Planck Encyclopedia of Public International Law*, par. 4.

Wright, Q. (1949). The Corfu Channel case. *The American Journal of International Law*, 43, 491ss.

Wright, Q., (1924). The distinction between legal and political

questions with especial reference to the Monroe doctrine. *Proceedings of the American Society of International Law*, 18, 62ss.

Yee, S. (1999). Forum prorogatum in the international court. *The German Yearbook of International Law*, 49, 148ss.

Yung Chung, I. (1959). *Legal problems involved in the Corfu Channel incident*. E. Droz, Geneva-Paris.

Zemanek, K. (1998). Unilateral legal acts revisited. In K. Wellens (ed.). *International law: Theory and practice. Essays in Honour of Eric Suy*. Martinus Nijhoff Publishers, Dordrecht, London, Boston.

Ziccardi Capaldo, G. (2016). *The pillars of global law*. ed. Routledge, London & New York.

Zimmermann, A., Tams, C.J., Oellers Frahm, K., Tomuschat, C. (eds.). (2019). *The statute of the International Court of Justice. A commentary*. Oxford University Press, Oxford, 92-116.

Zoller, E. (1977). *Le bone foi en droit international public*. ed. Pedone, Paris.

Zoller, E. (1980). L'affaire du personnel diplomatique et consulaire des États-Unies a Téhéran. *Revue Générale de Droit International Public*, 84, 974ss.

Zyberi, G. (2007). The development and interpretation of international human rights and humanitarian law rules and principles through the case-law of the International Court of

Justice. *Netherlands Quarterly of Human Rights*, 25, 118ss.